S. Hrg. 100-775

UNIFORM HEALTH AND SAFETY WHISTLEBLOWERS PROTECTION ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON LABOR

OF THE

COMMITTEE ON
LABOR AND HUMAN RESOURCES
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

SECOND SESSION

ON

S. 2095

TO STRENGTHEN THE PROTECTIONS AVAILABLE TO PRIVATE EMPLOYEES AGAINST REPRISAL ACTIONS FOR DISCLOSING INFORMATION, TO PROTECT THE PUBLIC HEALTH AND SAFETY, AND FOR OTHER PURPOSES

JULY 26, 1988

Printed for the use of the Committee on Labor and Human Resources

U.S. GOVERNMENT PRINTING OFFICE
88-469 WASHINGTON : 1988

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

S541-2

COMMITTEE ON LABOR AND HUMAN RESOURCES

EDWARD M. KENNEDY, Massachusetts, *Chairman*

CLAIBORNE PELL, Rhode Island
HOWARD M. METZENBAUM, Ohio
SPARK M. MATSUNAGA, Hawaii
CHRISTOPHER J. DODD, Connecticut
PAUL SIMON, Illinois
TOM HARKIN, Iowa
BROCK ADAMS, Washington
BARBARA A. MIKULSKI, Maryland

ORRIN G. HATCH, Utah
ROBERT T. STAFFORD, Vermont
DAN QUAYLE, Indiana
STROM THURMOND, South Carolina
LOWELL P. WEICKER, Jr., Connecticut
THAD COCHRAN, Mississippi
GORDON J. HUMPHREY, New Hampshire

Thomas M. Rollins, *Staff Director and Chief Counsel*
Kristine A. Iverson, *Minority Staff Director*

Subcommittee on Labor

HOWARD M. METZENBAUM, Ohio, *Chairman*

SPARK M. MATSUNAGA, Hawaii
TOM HARKIN, Iowa
BARBARA A. MIKULSKI, Maryland
EDWARD M. KENNEDY, Massachusetts (Ex Officio)

DAN QUAYLE, Indiana
GORDON J. HUMPHREY, New Hamphire
ROBERT T. STAFFORD, Vermont
ORRIN G. HATCH, Utah (Ex Officio)

James J. Brudney, *Chief Counsel*
Robert M. Gutman, *Minority Counsel*

CONTENTS

STATEMENTS

Tuesday, July 26, 1988

Page

Alvarez, Fred W., Assistant Secretary for Employment Standards Administration, U.S. Department of Labor, Washington, DC 50
  Prepared statement 52
Breger, Marshall J., chairman, Administrative Conference of the United States, Washington, DC, and Eugene R. Fidell, attorney, Klores, Feldsman and Tucker, Washington, DC 75
  Prepared statements of:
    Mr. Breger 77
    Mr. Fidell 125
Buethe, Scott A., Williamsville, NY; Ronald M. Masters, Columbia, PA; Bette Simon, Dewey, OK, and Richard E. Condit, staff attorney, Government accountability project, Washington, DC 13
  Prepared statements of:
    Mr. Masters 18
    Ms. Simon 26
    Mr. Condit (with supplemental statement) 36
Coughlin, Michael A., former employee of Simmons' Industries, prepared statement (with an attachment) 145
Ford, Ford B., chairman, Federal Mine Safety and Health Review Commission, prepared statement 156
Forum of United States Administrative Law Judges, Judge Bruce L. Birchman, chairman, legislative committee, prepared statement 137
Fowler, Laurie, on behalf of the American Civil Liberties Union of Georgia, prepared statement 143
Metzenbaum, Hon. Howard M., a U.S. Senator from the State of Ohio, prepared statement (with an attachment) 3
U.S. Chamber of Commerce, Albert D. Bourland, vice president, Congressional Relations, prepared statement 135

ADDITIONAL MATERIAL

Articles, publications, etc.:

  Federal protection of private sector health and safety whistleblowers, by Eugene R. Fidell, from the Administrative Law Journal, the American University, vol. 2, Spring 1988, No. 1 84
  A critique of the underlying rationals and specific provisions of S. 2095 as they would apply in the nuclear power industry 161
  "The Deadly Dilemma" when OSHA fails to protect the worker's right to a workplace free of health and safety hazards, a report from the OSHA watchdog project of WISCOSH, the Wisconsin Committee on Occupational Safety and Health, by Joan M. McManus, November 15, 1987 211

UNIFORM HEALTH AND SAFETY WHISTLEBLOWERS PROTECTION ACT

TUESDAY, JULY 26, 1988

U.S. SENATE,
SUBCOMMITTEE ON LABOR,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, DC.

The subcommittee convened, pursuant to notice, at 8:32 a.m., in room SD-430, Dirksen Senate Office Building, Senator Howard M. Metzenbaum (chairman of the subcommittee) presiding.

Present: Senator Metzenbaum.

OPENING STATEMENT OF SENATOR METZENBAUM

Senator METZENBAUM. The subcommittee will come to order.

The Chair wants to announce that the hearing time was advanced because of a conflict with another hearing at 10:00 which the Chair feels obligated to be present at, having to do with Mr. Burns and Mr. Weld.

Today's hearing is on S. 2095, the Uniform Health and Safety Whistleblowers Act. The bill is designed to protect workers who do the right thing, who tell the truth, who make our lives better and our society safer. Workers who help avert disaster by reporting dangerous or illegal practices should actually be honored as heroes.

Instead, in too many cases, they are treated like pariahs. Their reward is to be fired, harassed, demoted, or blacklisted for telling the truth.

We cannot tolerate this situation. It is a fundamental principle of good government that citizens should assist in the enforcement of our laws by reporting illegal activities to the proper authorities.

But if we expect workers to help us enforce the health and safety laws, we must do more than provide public praise and encouragement. Courageous private sector whistleblowers need and deserve effective Federal laws—Federal laws with real teeth—to protect them from personal reprisal. That's what this bill is all about.

The Administrative Conference of the United States, an independent Federal agency charged with recommending improvements to Federal administrative procedure, conducted an in-depth study of existing Federal whistleblower protection laws. The Uniform Health and Safety Whistleblowers Protect Act tracks the recommendations of the Administrative Conference study. It creates a uniform definition of protected activity along with a uniform schedule of remedies. It establishes a uniform and reasonable statute of limitations at 180 days. The bill centralizes the administrative process in the Department of Labor and grants the Secretary of Labor rulemaking and subpoena power.

It provides for on-the-record hearings before an administrative law judge with judicial review in the court of appeals and enforcement through the district courts.

This bill also corrects another problem raised by the Administrative Conference. There are huge gaps in whistleblower protection because there is no Federal protection for employees in the aviation, maritime, pharmaceutical, food processing or consumer goods industries. Think about what that means. An airline pilot can be fired for refusing to fly an unsafe plane; a lab technician can be punished for reporting life-threatening irregularities in prescription drugs or medical devices; a food processor can be hounded out of a job for uncovering tainted and diseased food products.

We cannot allow workers in these important industries to fall through the cracks in the law. Because we are serious about the public health and safety, this bill closes giant loopholes by protecting workers in those vital industries.

We will hear a broad range of testimony today. I am pleased that the Chairman of the Administrative Conference, along with the consultant to the Conference, are here today to testify. We will also hear from the Department of Labor and the Government Accountability Project, the leading organization representing whistleblowers.

Finally, I welcome to this Subcommittee three courageous individuals who blew the whistle on health and safety hazards and lost their jobs because they were willing to do the right thing. They suffered because they told the truth. They are here today to tell their stories and to demonstrate why this legislation is so badly needed.

Without objection, the Chair's entire statement will be put into the record.

[The prepared statement of Senator Metzenbaum, with an attachment, follows:]

U.S. Senator Howard M.
METZENBAUM
of Ohio

Committees:
Judiciary
Labor and Human Resources
Energy and Natural Resources
Select Committee on Intelligence

Chairmanships:
Subcommittee on Antitrust
Subcommittee on Labor
Subcommittee on Energy
Regulation and Conservation

Statement of Senator Howard M. Metzenbaum at the Labor Subcommittee Hearing on S. 2095--the Uniform Health and Safety Whistleblowers Protection Act

July 26, 1988

Today's hearing is on S.2095--the Uniform Health and Safety Whistleblowers Protection Act. The bill is designed to protect workers who do the right thing, who tell the truth, who make our lives better and our society safer. Public health and safety is not a partisan issue. That's why this bill already has solid bipartisan support with Senators Harkin, Pell, Weicker, Kennedy, Mikulski and Stafford as cosponsors.

Private sector employees should feel free to report illegal or improper activities that endanger the public health or safety without fear of personal reprisal. Workers who help avert disaster by reporting dangerous or illegal practices should be honored as heroes. They deserve our gratitude. They should get medals. At the very least they should be praised by their employers. Instead, in too many cases, they are treated like pariahs. Their reward is to be fired, harassed, demoted or blacklisted for telling the truth.

We cannot tolerate this situation. It is a fundamental principle of good government that citizens should assist in the enforcement of our laws by reporting illegal activities to the proper authorities. But if we expect workers to help us enforce the health and safety laws, we must do more than provide public praise and encouragement. Courageous private sector whistleblowers need and deserve effective federal laws--federal laws with real teeth--to protect them from personal reprisal.

That is what this bill is all about. More than a dozen federal laws provide some protection for private sector whistleblowers in specific industries. The current federal laws, enacted in piecemeal fashion over a number of years, are a confusing patchwork of protections. You do not have to take my word for it. The Administrative Conference of the United States, an independent federal agency charged with recommending improvements to federal administrative procedure, conducted an in-depth study of the existing federal whistleblower protection laws. The Conference concluded that the existing laws lack uniformity. The Conference warned that the unexplained differences in the statutes threaten "to undermine the credibility of this area of the law." The entire report by the Conference, including the analysis by the consultant, will be included in the record of this hearing.

The Uniform Health and Safety Whistleblowers Protection Act tracks the recommendations of the Administrative Conference study. It creates a uniform definition of protected activity along with a uniform schedule of remedies. It establishes a uniform and reasonable statute of limitations at 180 days. The bill centralizes the administrative process in the Department of Labor and grants the Secretary of Labor rulemaking and subpoena power. It provides for on-the-record hearings before an adminstrative law judge with judicial review in the court of appeals and enforcement through the district courts.

In addition, the bill includes specific, realistic time limits at each stage of the proceeding to insure expeditious consideration of a whistleblower's complaint. To bring order to the current federal chaos in this area, the bill supersedes existing federal laws that protect private sector employees who blow the whistle on health or safety violations.

This bill also corrects another problem raised by the Administrative Conference. There are huge gaps in whistleblower protection because there is no federal protection for employees in the aviation, maritime, pharmaceutical, food processing or consumer goods industries. Think about what that means--an airline pilot can be fired for refusing to fly an unsafe plane; a lab technician can be punished for reporting life-threatening irregularities in prescription drugs or medical devices; a food processor can be hounded out of a job for uncovering tainted and diseased food products. We cannot allow workers in these important industries to fall through the cracks in the law. Because we are serious about the public health and safety, this bill closes giant loopholes by protecting workers in those vital industries.

Protecting whistleblowers is good government and smart business. The free flow of information about health and safety hazards should not be chilled. Under our current system, irresponsible employers can cover-up illegal, dangerous activities by intimidating workers into silence with threats of personal reprisal. This bill will help eliminate that intimidation and will allow us to protect the public from corporate outlaws.

We will hear a broad range of testimony today. I am pleased that the Chairman of the Administrative Conference, along with the consultant to the Conference, are here today to testify. We will also hear from the Department of Labor and the Government Accountability Project, the leading organization representing whistleblowers. Finally, I welcome to this Subcommittee three courageous individuals who blew the whistle on health and safety hazards and lost their jobs because they were willing to do the right thing. They suffered because they told the truth. They are here today to tell their stories to demonstrate why this legislation is so badly needed.

March 1988

Summary of Uniform Health and Safety Whistleblower Act

Private sector employees should be able to report unlawful or hazardous activities that endanger the public health or safety without fear of personal reprisal. The current federal statutory scheme to protect private sector employees who "blow the whistle" on employers is a patchwork collection of over a dozen laws with different standards for protected activity, different administrative and enforcement provisions, and different groups of protected employees. On February 25, 1988, Senator Howard M. Metzenbaum of Ohio introduced S. 2095, the Uniform Health and Safety Whistleblowers Protection Act, to create more effective, efficient protection for private sector whistleblowers.

The omnibus legislation tracks the recommendations of the Administrative Conference, an independent federal agency charged with reviewing federal administrative procedures. The bill improves the current system by (1) creating uniform standards for protected activity; (2) centralizing administration and enforcement procedures within the Department of Labor; (3) closing existing gaps in coverage so that employees in all industries are protected; and (4) ensuring that the whistleblower's underlying health or safety complaint is referred to the appropriate federal agency for investigation.

Protected Activity

The Act prohibits discrimination against an employee because the employee engages in any of the following activities:

--disclosure of an employer's activity which the employee reasonably believes is a violation of federal law that creates a danger to the public health or safety;
--assistance or participation in a proceeding before a federal agency relating to an employer's activity which the employee reasonably believes creates a danger to the public health or safety; or
--refusal to participate in an employer's activity which the employee reasonably believes poses an imminent and substantial danger to the public health or safety.

The public health or safety encompasses the health or safety of the employee, other employees or the general public. The protection of the Act does not apply if the employee deliberately violates a federal law.

Procedure & Remedies

The Act provides for a uniform administrative procedure centered in the Department of Labor. All complaints would be investigated initially by the Department of Labor. After this investigation, any party can request a hearing on the record before an administrative law judge within the Department of Labor. The decision of the hearing officer will be final unless the Secretary of Labor grants any party's request for an appeal and issues a subsequent decision. Any party can appeal the final decision of the Secretary to the court of appeals.

Quick resolution of a whistleblower's complaint furthers the interests of the employee, the employer and the public. Therefore, the Act includes specific, realistic time limits at each stage of the procedure to insure expeditious consideration of the complaint. If the Department of Labor does not issue a final decision within the prescribed time period, then the whistleblower may bring a civil action to obtain protection.

A person violating the Act must make the employee whole. Such compensation may include reinstatement with back pay, compensatory or exemplary damages or equitable relief. The Secretary and the parties are authorized to bring civil actions to enforce compliance with any orders issued under the Act.

The Department of Labor is responsible for employee protection, but it may not have the expertise or authority to deal with the underlying health or safety violation. Therefore, the Act requires the Secretary of Labor to refer all final orders to the relevant federal agency to take appropriate action regarding the substantive health or safety allegation.

The Act supersedes other federal whistleblower laws to the extent those other laws provide inconsistent rights to private sector health or safety whistleblowers. The administrative and enforcement provisions of the Act will be the exclusive mechanisms for other federal whistleblower laws.

In sum, the bill is designed to eliminate the gaps and inconsistencies in current federal whistleblower laws. For more detailed information about the Uniform Health and Safety Whistleblower Protection Act, contact Al Cacozza, Counsel to the Senate Labor Subcommittee at (202) 224-5546.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
2120 L STREET, N.W., SUITE 500
WASHINGTON, D.C. 20037
(202) 254-7020

OFFICE OF
THE CHAIRMAN

1 CFR § 305.87-2

Recommendation 87-2

Federal Protection of Private Sector Health and Safety Whistleblowers

Adopted June 11, 1987

Private sector employees who make disclosures concerning health and safety matters pertaining to the workplace are protected against retaliatory actions by over a dozen federal laws. By common usage these employees, as well as others who make similar disclosures concerning fraud or other misconduct (but who are beyond the Conference's current study),[1] have become known as whistleblowers. Under current statutes, for example, nuclear power plant workers, miners, truckers, and farm laborers are specifically protected when acting as whistleblowers. Other workers may be covered under the more general protections granted by the Occupational Safety and Health Act (OSHA) or various environmental laws.

The protection provided employees by the so-called whistleblower statutes under study serves the important public interest of helping ensure the health and safety of workers in the various regulated industries or activities, as well as that of the general public. The statutes are intended to create an environment in which an individual can bring a hazardous or unlawful situation to the attention of the public or the government without fear of personal reprisal. Such disclosures can be a valuable source of information especially where the public lacks the knowledge or access to information necessary to be fully informed on these important issues.

---

[1] The Conference has limited its study to health and safety related disclosures because in this area a pattern of federal statutory protections has emerged with sufficient experience to allow a study.

In its examination of the current federal statutory scheme designed to protect whistleblowers in the private sector, the Conference found that, as currently written, the various whistleblower statutes lack uniformity in a number of areas including the following:

1. Investigative responsibility is assigned to numerous agencies, including the Department of the Interior and several within the Department of Labor (DOL), with little coordination among them.

2. Adjudicatory responsibility is similarly divided. For example, while several statutes provide for adjudication by a DOL administrative law judge, others provide for decisions by different agencies or for trial in the district court.

3. Judicial review likewise differs. Some statutes provide for review in the district court, some in the court of appeals. And for some, no review is available.

4. Statutes of limitations for filing a complaint range from 30 days to 180 days.

5. Definitions of protected conduct differ according to statute. For example, protected disclosure may include any disclosure or may be more narrowly defined as disclosure to "the public," to the media, to the responsible agency, or to a union or employer. Protected conduct may or may not include refusals to work.

6. In certain cases where the designated agency declines to proceed with the complaint (under either the OSHA or the Asbestos Hazard Emergency Response Act), the complaining employee is left without any further administrative or judicial review.

As a result of these statutory incongruities, available procedures and protections may differ depending solely upon the industry to which an aggrieved employee belongs. For example, an employee seeking protection under the Clean Air Act (CAA) has 30 days in which to file a complaint, while an employee filing under provisions of the Migrant Seasonal and Agricultural Worker Protection Act (MSAWPA) has 180 days. And while both CAA and MSAWPA violations are investigated by the Wage and Hour Division of the Department of

Labor, adjudication of CAA complaints is before a DOL administrative law judge, while MSAWPA complaints are adjudicated in the district courts. The Conference has concluded that this lack of uniformity does not appear to be reasoned, but most likely reflects the incremental enactment of the various statutes over a period of years.

Accordingly, the Conference believes that omnibus whistleblower legislation providing for centralization of the investigative and adjudicative functions is needed. Because the Department of Labor now investigates and adjudicates such complaints under the majority of existing statutes, centralization in that Department is the logical choice. Although specialized expertise possessed by agencies responsible for the various regulatory programs covered by whistleblower provisions may be required in exceptional circumstances to resolve these disputes, the Conference believes that centralization is preferrable and that enforcement and adjudicative responsibilities should where feasible be assigned to the DOL.

The Conference study also discussed areas of regulation where gaps in whistleblower protection exist. These include the aviation and aeronautics industries, vessel construction and operation, and manufacturing and production of food, drugs, medical devices or consumer products generally. Where Congress has judged it necessary to regulate an industry so as to ensure the safety of its workplace, products, services or the environment, Congress should consider whether it is appropriate that enforcement of the regulatory scheme be strengthened by providing whistleblower protection for the industry's employees who report statutory violations.

The study also indicated that access to written decisional precedents in these cases needs to be improved. The Department of Labor's Office of Administrative Law Judges does not yet publish its decisions (although it has recently announced plans to do so), and a unified index for these decisions and those of other agency adjudicative bodies does not exist. Publication and indexing of existing case law should help narrow the issues for future adjudications, contribute to a sense of fairness in the adjudicatory process, and improve case management. In addition, the study found that, with certain exceptions, there is little interaction between the program agency and the investigating/adjudicating agency, thus diminishing the involvement of the lead program agencies. Procedures should be established by which program agencies provide assistance to investigative agencies, and adjudicatory agencies report decisions back to the program agency.

Finally, the Conference notes that there is a growing amount of litigation in state courts concerning whistleblowers, but does not take a position on whether federal statutes do or should preempt state law in this field. (ACUS Recommendation 84-5, Preemption of State Regulation by Federal Agencies, recommends that Congress address foreseeable preemption issues, and advises regulatory agencies to be aware of situations where a conflict might arise.)

With the increasing interest in these matters by Congress, the media and the general public, the Conference hopes that its study will provide a foundation for needed improvements.

RECOMMENDATION

I. In the interest of uniform treatment of private sector health and safety whistleblowers, Congress should enact omnibus legislation for the handling and resolution of whistleblowers' complaints. In enacting this legislation, Congress should review the categories of workers to which it is appropriate to extend whistleblower protection. As a general matter, the administration of this program should be centralized in the Department of Labor in furtherance of efficiency and harmony of results. If, however, Congress deems it necessary for a program agency to retain or receive investigative or adjudicative responsibility for whistleblower complaints, Congress should strive for uniformity in the substantive protections and procedures applicable to the separate program.[2] The omnibus and any other whistleblower legislation should include:

(A) a uniform definition of protected conduct;

(B) a uniform statute of limitations of not less than 180 days governing the filing of complaints;

(C) a uniform provision for remedies;

(D) assignment of preliminary investigative responsibility to the Secretary of Labor[3] for all private sector health and safety whistleblowing retaliation cases;

(E) authorization for the Secretary of Labor to employ alternative means of resolving these disputes, with the consent of the parties (see ACUS Recommendation 86-3, Agencies' Use of Alternative Means of Dispute Resolution);

---

[2] The Conference does not intend to suggest that whistleblower protection provisions now administered by the Department of Labor be reassigned. Nor is this recommendation intended to affect the existing jurisdiction of the National Labor Relations Board to investigate and adjudicate allegations of unfair labor practices.

[3] All references to the Secretary of Labor in recommendations I(D)-I(H) encompass other appropriate agency heads in instances where Congress deems it necessary for a program agency to retain responsibility.

(F) provision for an opportunity by any affected person to request an on-the-record APA hearing before a Department of Labor administrative law judge and for discretionary review by the Secretary of Labor, judicial review in the courts of appeals, and enforcement in the district courts;

(G) a grant of subpoena power to the Secretary of Labor for whistleblowing investigations and hearings, with provision for judicial enforcement; and

(H) a grant of rulemaking authority to the Secretary of Labor with respect to investigative and adjudicatory procedures, notice-posting requirements and mandatory coordination with other agencies.

II. Whether or not Congress enacts omnibus whistleblowing legislation, the Secretary of Labor should:

(A) promulgate rules of appellate procedure governing practice and procedure in connection with the Secretary's review of administrative law judge decisions in whistleblower cases;

(B) transfer primary private sector health and safety whistleblowing investigative responsibility to a single entity within the Department of Labor, absent compelling reasons to the contrary;

(C) develop, in consultation with the agencies responsible for the substantive regulatory programs, detailed written procedures for coordinating investigation, adjudication and follow-up in whistleblowing cases; and

(D) in accordance with the Freedom of Information Act, 5 U.S.C. §552(a)(2)(A), index and publish all ALJ and Secretarial decisions in whistleblowing cases, including those rendered prior to the date of this recommendation.

Senator **Metzenbaum**. Before we begin, I note that there are no witnesses today from the business community. I want to make clear, however, that the business community was more than welcome to testify. We worked with the Ranking Minority Member of the Subcommittee in scheduling this hearing. Senator Quayle took the lead in finding business witnesses. He made a good faith effort to do so, and I appreciate his efforts in that respect. He contacted the Chamber of Commerce and other business organizations.

Despite Senator Quayle's efforts, business representatives decided not to testify today.

The record will remain open for 10 days after the hearing for any interested parties, including business representatives, to submit written statements. But the silence of the business community at today's hearing suggests to me that American business has no significant criticism regarding this bill. I hope that is the fact.

Although I am somewhat surprised that the business community has chosen not to testify on such an important legislative issue, I am pleased that the business community appears to be comfortable with my bill as written.

Our first witnesses today are a panel: Scott Buethe, formerly employed as a copilot with Britt Airlines; Ronald Masters, formerly employed as a quality control inspector with Daniel International Construction Company; Bette Simon, formerly employed as a grader with Simmons chicken processing plant; and Richard Condit, Staff Attorney with the Government Accountability Project, Washington, DC.

We are happy to have each of you with us. The Committee rules for this kind of a hearing provide for five minutes of testimony for each witness. We hope that you will confine yourselves to that period of time. The yellow light will go on one minute before your time expires.

Scott Buethe, from Williamsville, New York, we are very happy to have you with us, sir. And I want to commend each of you for your courage in speaking up at your place of employment as well as for your willingness to appear before us this morning.

Please proceed, Mr. Buethe.

STATEMENT OF SCOTT A. BUETHE, WILLIAMSVILLE, NY; RONALD M. MASTERS, COLUMBIA, PA; BETTE SIMON, DEWEY, OK, AND RICHARD E. CONDIT, STAFF ATTORNEY, GOVERNMENT ACCOUNTABILITY PROJECT, WASHINGTON, DC

Mr. **Buethe**. Thank you.

My name is Scott Buethe. I am an engineering test pilot. I work for the Calspan Corporation in Buffalo, New York.

I began flying 15 years ago at the age of 15, and I have since devoted my entire career to piloting and aeronautical engineering. I have a Bachelor's Degree in Professional Pilot Technology; and both Bachelor and Master of Science Degrees in Aeronautical Engineering from Purdue University.

I am currently an Aircraft Commander on the TIFS Total In-Flight Simulator, which is an experimental C-131 owned by the United States Air Force. It is the most advanced in-flight simulator in the world. It has been used in the development of many recent airplanes including the Concorde, X-29, Space Shuttle, and Boeing 7J7.

In March of 1979, Britt Airlines, which is a regional commuter airline serving the Chicago O'Hare and Indianapolis International Airports, contacted Purdue University, where I was a student nearing graduation, in search of new pilots. The Head of Aviation Technology at Purdue contacted me and arranged an interview.

I travelled to the Britt Airlines Headquarters, and after a short interview, was hired on the spot. My experience at that time was approximately 1,200 hours of flight time, with 500 hours of multi-engine time working for another commuter airline while I was in school. I had also been a flight instructor and had trained approximately 20 pilots to certification.

After completion of my training at Britt Airlines, I began flying as a line officer on a 13-passenger twin-engine turboprop.

My first year with Britt Airlines was unremarkable except for the fact that I was paid $7.50 per flight hour and was not paid for time spent on the ground. I flew approximately 55 hours per month and consequently earned $5,000 that first year, being content that I was gaining valuable piloting experience.

In March of 1980, my troubles with Britt Airlines began. A new captain and I made an uneventful flight to Chicago O'Hare Airport, where we were scheduled for an aircraft change. After escorting our passengers into the terminal building, I went out to our new aircraft to clean it up and to check the maintenance log. Therein I discovered a write-up indicating that the autofeather system was inoperative. I'll explain what that means in just a second.

On return to the terminal building, I informed the Captain of the situation, and although the autofeather system is a mandatory no-go item, he suggested that we go anyway, with a full load of passengers, in clear violation of the law.

Now, the autofeather system is a safety device on the aircraft which monitors the engines during take-offs and landings. In the event of an engine failure, this system will turn the propeller blades into the wind, thereby reducing the drag on the aircraft. Failure to do this makes the aircraft unable to hold altitude with a full load of passengers and can result in an uncontrolled impact with the ground—commonly known as a crash.

The item I mentioned, the autofeather, is required by the FAA. It is in black and white. There is a list in each aircraft of which items are required and which are not. It was stated company policy that this list would be followed to the "T" and was required by law. There was no question that this item had to be operative in order to go.

I was forced to refuse the flight and was threatened by the Captain that it would affect my chances of being promoted within the company. I replied that it wasn't worth it to me and offered instead to ferry the aircraft to a maintenance base with no passengers onboard—this being allowed by the FAA.

The Captain and I did indeed ferry the aircraft to a maintenance base uneventfully. Later I was chastised by two senior members of Britt Airlines because they had lost approximately $1,000 by not carrying passengers on the flight.

One month later, a similar incident occurred. On pre-flight inspection at the beginning of the day, the same Captain and I discovered a writeup in the maintenance log stating that when the flaps were extended past the approach position, they had suddenly retracted to the full up position. I was not immediately concerned because, although dangerous if left unrepaired, it was a relatively simple procedure to adjust these flaps.

The Captain and I then proceeded to taxi the aircraft from the hangar to the terminal building, stopping along the way to do engine run-ups and system checks. During these checks, we discovered the fire warning system to be inoperative. Again, the fire warning system is a mandatory item required by the Minimum Equipment List. It is an FAA regulation that it be operative in order to take the flight.

Upon arrival at the terminal, the Captain appeared to be planning the flight as if there were no problem, and I suspected that he had no intention of calling maintenance. My suspicions were confirmed when I informed him that I would be unable to fly the flight unless maintenance was done, and instead of following proper procedure, he proceeded to call other copilots who were off-duty in an attempt to find someone else who would fly the flight illegally. He was unsuccessful and was forced to call maintenance. Being Sunday, this required bringing someone in special and paying overtime. The repairs took several hours, and upon completion we flew the remaining flights for the day.

At the time of this second incident, the Chief Pilot was on medical leave. When he returned to work in June of 1980, I was called into his office. He asked what right I had to refuse the two flights considering that the Captain had over 10,000 hours of flight time. He also said that a copilot should keep his eyes open and his mouth shut. He said that I was fired, and that as long as he was Chief Pilot, I would never work there again. I went to the president of the company seeking reinstatement, but was unsuccessful.

I reported these events to the FAA, and they investigated. They did find the maintenance discrepancies that I had indicated, but said they were unable to take any action because the flights were never flown.

At this point, I sought counsel and filed a lawsuit, feeling a moral obligation that the public should be informed and that Britt Airlines should be punished for their improper actions and their placing of profit before safety.

I was also seeking reinstatement, attempting to remove this blemish from my otherwise perfect record.

After several years of out-of-court litigation, including a summary judgment against me, an appeal, and a final summary judgment, my case was dismissed essentially because there was no law to protect me, and it was Britt Airlines' right to fire me for whatever reason they chose, either good, bad, or indifferent.

Thank you.

Senator **Metzenbaum**. Thank you very much, Mr. Buethe. You make a very strong case as to why we need legislation of this kind. But you did what you thought you should do, what the Chair of this Committee feels you should have done; you were concerned about the safety of passengers as well as your own safety, the safety of the pilot.

I have one question. What did the president of the company say when you went to him?

Mr. **Buethe**. At first he said he would look into the matter, and a few days later I returned, and he said he was unable to overturn the position of the people in management because he felt that backing them was more important than my particular problems.

Senator **Metzenbaum**. Is Britt Airlines still flying?

Mr. **Buethe**. No, sir. They've been bought by Continental Airlines.

Senator **Metzenbaum**. Thank you.

Mr. Masters, we are very happy to have you with us today, sir.

Mr. **Masters**. My name is Ronald Mark Masters. I am 32 years old, married, with three children.

I reside in Columbia, Pennsylvania, selling office supplies with my father.

In 1972, I started construction work in Alberta, Canada as a boilermaker apprentice. I worked there for three years, then moved to California and worked for Exxon Oil as a boilermaker.

In 1980, my family moved to Kingsport, Tennessee, where I applied for a pre-level I quality control inspector job with Daniel International Construction Company. I was hired, and I started in December 1980 at the Tennessee Eastman Kodak Coal Gasification Site.

Daniel offered me a transfer in December of 1982 to a new construction site in Kansas. I was employed as a nuclear civil quality control inspector by Daniel International at the Wolf Creek Nuclear Generating Station in Kansas.

In late 1983 and early 1984, I was inspecting the fuel handling building. This building contains the nuclear material for the plant. The inspection was for final turnover of the building to the utility, Kansas Gas & Electric.

I discovered there was a breakdown of the inspection process regarding safety-related structural steel. The problem was that pieces of structural steel might not have been installed, and the pieces that were installed may not be up to project specifications.

I brought this to the attention of my supervisors, and they said, "Straighten it out; get it done; do whatever it takes to turn the building over to the utility by February 1st."

I explained that it was impossible to complete this inspection correctly and mark up the steel erection prints properly, because the steel was embedded in concrete and also fireproofed.

By February 1st of 1984, I decided to follow site procedure and write an NCR, which is a nonconformance report, for the government standards. My supervisor saw what I was doing, took the erection prints from me, went into a back room, where they falsely marked up the prints to make it appear the inspections had been done when in fact they had not been.

The next day, I reported my concerns to the NRC site representative. Within a matter of days, my superiors learned that I had gone to the NRC, and they started a campaign of intimidation and harassment. They called me names, separated me from my working partner, built a file of discriminatory allegations against me, lowered my performance rating, gave me work to do which was below my qualifications, and otherwise separated me from my working group.

I reported my concerns to KG&E's Quality First Program, and it began an investigation also. This program was set up by the utility to help mediate and investigate employee complaints concerning safety at a nuclear plant.

Daniel's mistreatment of me continued until August 22, 1984, when I was given an ROF, which is a Reduction in Force, meaning they laid me off. Daniel gave me only 30 minutes to leave the site, and I was escorted off by site supervisors. Before I left the site, I spoke again with Quality First and the NRC representatives and told them I wanted to make a formal complaint against Daniel International and KG&E. They said they would investigate my concerns and be in touch with me at a later date.

At the time of my termination, I did not know I needed to go to the Department of Labor within 30 days to make a complaint. I was most concerned with getting my family moved to Illinois, where I had found a job, and start providing for my family. I thought the NRC and Quality First programs were going to investigate and resolve my concerns.

I did seek legal advice from an attorney in Illinois in about November or December of 1984. He ultimately filed a retaliatory discharge lawsuit on my behalf on August 22 in Illinois. The case was transferred to Kansas, where the judge dismissed it because of the 30-day provision in the Employee Protection Statute, Section 210. The judge also ruled that Section 210 Federally preempts the State tort of retaliatory discharge.

After that, my attorney in Kansas learned that the NRC investigation concluded I was a victim of harassment and attempted intimidation, fined Kansas Gas & Electric $75,000, and made them do a 100 percent reinspection of all the structural steel on-site, and that the structural steel prints were intentionally falsified.

Another NRC investigation revealed serious inadequacies in the KG&E Quality First Program. My attorney filed a lawsuit for me against KG&E and Daniel on fraud, conspiracy, RICO, and intentional interference with employment relations. That lawsuit is still pending.

I believe the law must be changed. The 30-day provision in the so-called "Employee Protection" statute stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. It is indeed ironic that the employer can invoke as a shield against liability the very statute Congress enacted to protect and compensate victims of employer wrongdoing.

For whatever reasons—whether, like me, the employee is initially uncertain of his ability to prove that the employer's motive was indeed retaliatory, or he is unaware of the procedural limitations, or he is more concerned at first with relocating and providing for his family—30 days can quickly pass and the employee can be left with no remedy.

Thank you.

[The prepared statement of Mr. Masters follows:]

TESTIMONY OF RON MASTERS

My name is Ronald Mark Masters. I am 32 years old, married with 3 children. I reside in Columbia, Pennsylania, selling office supplies with my father. In 1972, I started construction work in Alberta, Canada as a boilermaker apprentice. I worked there for 3 years, then moved to California and worked for Exxon Oil as a boilermaker. In 1980, my family moved to Kingsport, Tennessee where I applied for a pre-level I quality control inspector job with Daniel International Construction Company. I was hired and I started in December, 1980 at the Tennessee Eastman Kodak Coal Gasification site.

Daniel offered me a transfer in December of 1982 to a new construction site in Kansas. I was a nuclear civil quality control inspector employed by Daniel International at the Wolf Creek Nuclear Generating Station in Kansas.

In late 1983 and early 1984, I was inspecting the fuel handling building. The building contains the nuclear material for the plant. The inspection was for final turnover of the building to the utility, Kansas Gas & Electric. I discovered there was a breakdown of the inspection process regarding safety-related structural steel. There was a problem that pieces of structural steel might not have been installed or those pieces that were installed might not be up to project specifications. I brought this problem to the attention of my supervisors. They just said to "straighten it out", "get it done", "do whatever it takes to turnover the building by February 1, 1984." I explained it was impossible to complete the inspection correctly and mark-up the steel erection prints properly because some of the steel was imbedded in concrete or fireproofed.

By February 1, 1984, I decided to follow proper [illegible] procedure and write an NCR, a nonconformance report, about the situation. My superiors saw what I was doing, took the steel erection prints from me, and went into a back room with the prints. They then falsely marked up the prints to make it appear the inspections had been done when in fact they had not.

The next day, I reported my concerns to the NRC site representative. Within a matter of days, my superiors learned that I had gone to the NRC and started a campaign of attempted intimidation and harassment. They called me names, separated me from my partner, built a file of discriminatory allegations against me, lowered my job performance rating, gave me work to do which was below my qualification, and otherwise ostracized me.

I reported my concerns to KG&E's Quality First program, and it began an investigation. This program was set up by the utility to help mediate and investigate employee complaints.

Daniel's mistreatment of me continued until August 22, 1984, when I was given an ROF, or Reduction in Force, meaning they layed me off. Daniel gave me only 30 minutes to leave the site and I was escorted off the site by Daniel's supervisors. Before I left the site, I spoke again with Quality First and NRC representatives and told them I wanted to make a formal complaint against Daniel JMH + KG+E They said they would investigate.

At the time of my termination, I did not know I needed to go to the Department of Labor within 30 days to make a complaint. I was most concerned with getting my family moved to Illinois, where I had found a job, and providing for family. I thought the NRC and Quality First were going to investigate and resolve my concerns.

I did seek legal advice from an attorney in Illinois in about November or December, 1984. He ultimately filed a retaliatory discharge lawsuit on my behalf on August 22, 1985, in Illinois. That case was transferred to Kansas, where the judge dismissed it because of the 30-day provision in the Employee Protection statute, Section 210. The judge also ruled that Section 210 federally preempts the state tort of retaliatory discharge.

After that, my attorney in Kansas learned that the NRC investigation concluded I was the victim of harassment and attempted intimidation, and that the structural steel prints were intentionally falsified. Another NRC investigation revealed serious inadequacies in the KG&E Quality First program. My attorney then filed another lawsuit for me against KG&E and Daniel alleging theories of fraud, conspiracy, RICO, and intentional interference with employment relations. That lawsuit so far is still pending, but I do not know whether it will also be dismissed.

I believe the law must be changed. The 30-day provision in the so-called "Employee Protection" statute stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. It is indeed ironic that the employer can invoke as a shield against liability the very statute

Congress enacted to protect and compensate victims of employer wrongdoing.

For whatever reasons--whether, like me, the employee is initially uncertain of his ability to prove that the employer's motive was indeed retaliatory, or he is unaware of the procedural limitations, or he is more concerned at first with relocating and providing for his family-- 30 days can quickly pass and the employee can be left without any remedy. Failure to change the 30-day provision will result in twisting the employee protection provision envisioned by Congress into employer protection.

Senator **Metzenbaum**. Thank you very much to the first two witnesses. Your testimony certainly indicates the quality of the people in the American work force, and I want to commend both of you. It takes some courage to speak out and indicate to your employer that something is wrong. For your efforts in that respect, it is obvious that all you got was the shaft. And the sad part is that the Government didn't step in to help you, the heads of the respective companies didn't step in to help you, and I think you could hardly make a more persuasive case as to why we need to change the law. We are certainly going to try to expedite the passage of this legislation.

I commend both of you.

Our next witness is Bette Simon. We are happy to have you with us today. You are from Dewey, Oklahoma. We are happy to have you with us.

Ms. **Simon**. Thank you, Mr. Chairman.

Mr. Chairman and Members of the Subcommittee, thank you for inviting me to testify today.

My name is Bette Simon. I am a former employee of the poultry industry, Simmons Industries, in Southwest City, Missouri. I will outline what you may agree are serious health threats due to illegal practices in the poultry industry. If you agree, then you should do everything possible to pass the Whistleblower Protection Act.

Under Federal law, corporate workers have no free speech rights to challenge food poisoning of the American people. If I still worked at Simmons, I could be fired on the spot for exposing the public health threats that I describe today.

During my employment at Simmons, I was assigned to the "swing crew" and trained to accomplish any job in the plant. I observed trailers of live chickens covered with maggots. The maggots were crawling over everything, due to the dead parts of birds remaining on those trailers. The maggots fell on the employees and on the floor and at times, it became so slick and slimy that it was difficult for the employees to stand or walk.

The machinery in the plant was improperly cleaned. Chicken parts were thrown on top of the main line and the trays above the chillers and stayed until they decayed.

Washing out of contaminated birds was done with such high force that the pressure forced chicken manure into the meat. Later, the process was changed to a solution of 70 percent chlorine—which was so strong that the employees' eyes watered, and the skin peeled from their hands. The birds that were improperly washed and trimmed were thrown into the chiller tanks, creating a fecal soup in the chillers. The chillers were not always kept at 40 degrees temperature or less, which made the fecal soup warm at times, and these birds soaked in that for an hour.

I was censured by company officials for trimming too deep in cutting out fecal contamination from the outside of the birds, as I was instructed to do by USDA inspectors, and for talking to them and trying to obey the Federal law.

Simmons asked me to train graders, but I was criticized for giving the graders instruction sheets and working with the USDA grader while training the new employees.

I was transferred to a different shift. On one occasion, I advised the plant vet about the number of tumors and other symptoms of advanced disease I had seen on the birds while training the graders. The vet stopped the line when they showed up the next day and ordered the birds to be reworked before they were cut up.

I was then called into the company office and told that we were not responsible for training USDA inspectors. During this meeting, I advised the plant officials of the excess tumors, bruises, leukosis, septic, and other undergrade birds being "A"-graded. I was removed from grading and never assigned to grading again.

While working in quality control, I became aware that the birds were being placed in production without being washed after falling on the floor. Wings covered with feathers, parts with leukosis, broken bones, bruises and tumors were packed and shipped regularly.

I observed the improper sealing of vacuum packs and incomplete drain times of water from the birds, which meant that consumers would pay for more water than allowed. Employees changed the drain time and process dates on the boxes, and although the plant records indicated water retention levels over the 12 percent allowable, plant employees were just ordered to squeeze the water out before the USDA inspectors checked their tagged birds for water.

When we brought the problems discussed above to the attention of the company officials, no changes were made, and they didn't stop the problems, so we decided to work with the USDA officials we trusted.

All the employees observed one USDA grader as he was harassed, falsely accused of misconduct, suspended, transferred and retired, for just doing his job, protecting the consumer.

I began to gather evidence and shared it with the USDA vet as well as its Office of Inspector General. The head vet at the plant called me his "eyes and ears". Through our efforts, the USDA officials were able to catch Simmons switching labels on hundreds of thousands of pounds of poultry that had been retained or rejected by the Government. Otherwise, an unsuspecting public would have eaten food that wasn't fit for human consumption.

I was observed by plant officials speaking with USDA inspectors, and from that day on I was watched constantly. I was able to continue my efforts through other employees. However, due to the harassment, they were afraid to speak for themselves, and since I was already identified, I became the conduit for the other employees.

I was placed on jobs with more and more stress. Severe tendinitis developed in both my hands and arms, as well as symptoms of carpal tunnel syndrome. I lost time from the job for treatment and took time off on doctor's orders, preventing severe hand problems. I feel I was assigned to these high-stress jobs to injure my health in an effort to get me to resign, or until I could no longer work. And when that didn't work, they fired me.

Since I left Simmons, the flow of information to GAP and USDA about violations of sanitation laws has slowed to a trickle. The other workers saw what happened to me, and were afraid to speak, so the company is free to go back to its old practices.

My direct experience barely scratched the surface of Simmons' harassment of corporate or Government workers who did anything that interfered with profits.

I am appalled by what I have seen and learned in the past six years. I have worked daily in an area where people's civil rights and Constitutional freedoms have been denied them simply because they worked for a company that felt it owned them, both on and off the job. These are the same employees whose fathers, husbands and sons serve in our military forces to defend our Constitutional freedoms and to fight the oppression of other peoples. Then our Government allows these companies to deny loyal Americans the very rights our families right to protect.

We need to actively enforce the laws we have now and pass this new Whistleblower Act to protect people of conscience who report dangers to communities or fellow workers. This can help restore workers' pride in their jobs and allow them to retain their rights.

Companies like Simmons seem to think it is a labor relations crime for plant workers to tell the truth. And until Congress gives us some free speech rights in terms of our jobs, companies like Simmons are the law where we work, and the public will continue to be at their mercy.

Thank you.

[The prepared statement of Ms. Simon follows:]

TESTIMONY OF BETTE SIMON

on the

UNIFORM HEALTH AND SAFETY WHISTLEBLOWER PROTECTION ACT

before the

Subcommittee on Labor,

Senate Labor and Human Resources Committee

July 26, 1988

Mr. Chairman and Members of the Subcommittee:

Thank you for inviting my testimony today. My name is Bette Simon. I am a former poultry employee of Simmons Industries, Inc., Southwest City, Missouri. I was employed at Simmons Industries for approximately six years.

In my testimony I will outline what you may agree are serious public health threats due to illegal practices in the poultry industry. If you do agree, then you should do everything possible to pass the Uniform Health and Safety Whistleblower Protection Act. Under federal law, corporate workers have no free speech rights to challenge food poisoning of the American people. If I still worked at Simmons, I could be fired on the spot for exposing the public health threats described in this testimony.

During my employment at Simmons Industries, I was assigned to the "swing crew," a group of selected employees who are trained to accomplish any job in the plant. I observed unsanitary conditions and the unhealthy product being processed to the consumer, and the federal violations exercised by this company.

MAGGOTS AND GENERAL FILTH

I observed live haul trailers arriving at the plant loaded with live chickens covered with maggots. The maggots were crawling all over the trailer, the chicken coops, and the live chickens. This was caused by dead chicken parts remaining on the trailers for days, weeks, and months, and the failure to clean the trailers at specific intervals of time.

Employees on the live dock (hangars) removed the chickens from the coops and placed them on the kill line. The maggots fell on the employees and the floor. The floor became so slick and slimy at times that it was difficult for the employees to stand or walk on it.

At times machinery in the plant was improperly cleaned. Chicken parts were thrown on top of the main line and tray above the chillers and remained there until they decayed.

WASHOUT

Water rinsing of the birds was accomplished with such high pressure that it forced chicken manure into the meat. Later the process was changed to a solution of up to 70 percent chlorine in the water -- so strong that employees' eyes watered and skin peeled from their hands. Birds improperly washed and trimmed were thrown into the chill tanks between inspections by the vet, creating a fecal soup in the chillers. Birds were agitated in the chillers for approximately one hour, and the chillers were not kept at 40 degrees at times, which made the fecal soup warm for the chickens.

TRIMMING FECAL CONTAMINATION

I was censured by company officials for trimming too deep in cutting out fecal contamination from the posteriors of the birds, as instructed by USDA inspectors, and for talking to USDA inspectors to properly accomplish the job according the federal law.

GRADING

Plant officials requested that I train graders when the night shift began, but I was criticized for giving graders grade instruction sheets and for working with the USDA grader while training these new employees. The USDA grader was transferred, supposedly due to an altercation between him and a plant employee, although any such problem had already been resolved weeks before his transfer. This was an excuse used by the company to get rid of a USDA grader for doing his job. The employee was fired, and I was transferred back to the day shift.

On one occasion I advised the plant vet about the number of tumors and other symptoms of advanced disease I had seen on the birds while training graders on the night shift. These birds were being processed the next day on the cut up line. The vet stopped the line and requested the floor inspector and plant quality control to reevaluate the birds before they were cut up. I was then called into the company office and told that we were not responsible for training USDA inspectors. During this meeting, I advised plant officials of my observation of excess tumors, bruises, leukosis, and under-grade birds being "A" graded. I was removed from grading and was never reassigned to that duty.

QUALITY CONTROL: CONSUMERS PAYING FOR FECAL WATER

While working in quality control, I became aware that the birds were being placed in production without being washed after falling on the floor. Wings covered with feathers, parts with leukosis, broken bones, bruises, and tumors were packed and shipped regularly. I observed improper sealing of CVP (vacuum pack) products and incomplete drain time of water from the birds, which meant consumers would pay for more water than allowed. Employees changed drain time and process dates on the boxes, although plant records indicated water retention levels in excess of the 12 percent allowable. Plant employees merely were ordered to squeeze excess water out of the birds before USDA inspectors checked tagged birds for water.

FIGHTING BACK WITHOUT ANY RIGHTS

When we brought the problems discussed above to the attention of company officials, the reply was they would "take care of it," which usually meant implementation of new or better methods to get by the USDA inspectors. No changes were made by management, so we decided to present these problems to trusted USDA officials.

All employees observed the plant USDA grader as he was effectively harassed, falsely accused of misconduct, suspended, transferred and retired, for just doing his job, by protecting the consumer. Many employees gave statements to the Government Accountability Project in this USDA grader's behalf.

I began collecting information on the unhealthy condition of the product being processed by this plant and the violations of federal. I shared this evidence with the USDA's Inspector-in-Charge (IIC), as well as its Office of Inspector General. The head vet at the plant called me his "eyes and ears." Through our efforts the USDA officials were able to catch Simmons switching hundreds of thousands of pounds of wholesome poultry for birds that had been retained or rejected by the government. Otherwise, an unsuspecting public would have eaten food that by law wasn't fit for human consumption.

The Government Accountability Project, in Washington, D.C., agreed to represent me in my efforts. I worked with Mr. Thomas Devine of GAP, and "60 Minutes" personnel who filmed and broadcast the unhealthy conditions in this processing plant.

RETALIATION

I was observed by plant officials speaking with USDA inspectors, and from that day on I was under close observation by plant officials. Due to my cooperation with USDA inspectors while assigned to trimming, grading, and quality control, I was assigned to the main line without notice. I felt that through this assignment the company intended to confine me to one area.

I was able to continue my activity of gathering information through other employees. However, due to the harassment they saw honest USDA officials and me receiving, they were afraid to speak for themselves. Since I already was identified, I became the conduit for disclosures of the other employees without free speech rights.

I was placed on jobs with more and more stress, accomplishing with one other employee a job which took three persons to accomplish. Severe tendinitis developed in both my hands and arms, as well as symptoms of corporal tunnel syndrome. I lost time from the job for treatment and took time off on doctor's orders to allow my hands and arms to rest, preventing severe hand and arm problems. I feel I was assigned these high-stress jobs to injure my health in an effort to get me to resign, or to injure my health until I could no longer accomplish my job.

Eventually I was discharged for accumulating too many disciplinary points, when I attended my husband's U.S. Department of Labor hearing to be available as a witness against Simmons Industries. My husband was fired for disclosing Simmons' environmental violations to a special agent of the USDA Office of Inspector General.

Since I left Simmons, the flow of information to GAP and the USDA about violations of sanitation laws has slowed to a trickle. The other workers saw what happened to me, so the company is free to go back to its old practices.

My direct experiences barely scratch the surface of Simmons' harassment of corporate or government workers who did anything that interfered with profits. During the summer of 1986 Simmons Industries processed approximately 60,000 chickens one day which were contaminated with fly spray. Company officials became aware of the problem with the water at 8:30 in the morning, but continued to process the chickens. When the night shift vet came on duty, he ordered the plant to be shut down and recalled all the processed birds. Some had already been cut up, packaged, and shipped. The truck was stopped by the Missouri Highway Patrol and the driver advised to return to the plant. Shortly after this incident, the night shift vet was transferred.

One employee made a remark in a local grocery store about eating chicken. She was called into the office and told that her job was in jeopardy, yelled at, intimidated, and told that she could not talk about the company that way.

I am appalled by what I have seen and learned in the past six years. I have worked daily in an area where people's civil rights and constitutional freedom have been denied them simply because they worked for a company that felt it owned them, both on and off the job. These are the same employees whose fathers, husbands, and sons serve in our military forces to defend our constitutional freedoms and to fight the oppression of other peoples. Then our government allows these companies to deny loyal Americans the very rights our families fight to protect.

We need to actively enforce the laws we have now and pass this new whistleblower act to protect people of conscience who report dangers to communities or fellow workers. This can help restore workers' pride in their jobs and allow them to retain their rights, regardless of their station in life or income. Companies like Simmons seem to think it is a labor relations crime for plant workers to tell the truth. And until Congress gives us some free speech rights, in terms of our jobs companies like Simmons _are_ the law where we work. The public will continue to be at their mercy.

Senator METZENBAUM. That's an excellent statement, Ms. Simon. I know you ran over your time, but I had your written statement, and I decided that I ought to give you an opportunity to finish it. It is a very, very good statement, and I appreciate your courage and your citizenship and your concern about people in this country. I am just very proud of you.

Thank you very much.

Our next witness is Richard Condit, from the Government Accountability Project.

Mr. Condit, we are happy to have you with us, sir.

Mr. CONDIT. Good morning. Thank you, Senator.

My name is Richard Condit. I am a Staff Attorney with the Government Accountability Project. I would like to begin by thanking the Subcommittee for allowing us to testify here today on what we view as very significant and important legislation.

The Government Accountability Project is a Washington, DC based non-profit public interest organization that was established in 1977. Essentially, GAP's purpose is to advocate on a variety of issues on behalf of whistleblowers from both the public and private sectors.

GAP and over 40 other organizations strongly support Senate Bill 2095, the Uniform Health and Safety Whistleblowers Protection Act, for a variety of reasons.

First, S. 2095 sets up a uniform system to deal with all whistleblower complaints of retaliation. This is important from an administrative standpoint.

Second, the bill creates a uniform definition of "protected conduct" which is important because that allows both employers and employees to understand what their rights are.

Third, the bill provides protection for all workers in the private sector who raise concerns about issues that may endanger public health and safety.

Fourth, the bill provides subpoena power to the Department of Labor.

Fifth, the bill also provides expeditious resolution of complaints. Under the current scheme, it has been GAP's experience that it takes anywhere from two to four years to get a final decision from the Secretary of Labor in these types of cases. Your bill, Senator, would provide a 365-day maximum for obtaining a final decision.

Sixth, the bill ensures for the first time that whistleblowers' complaints will be referred to the appropriate Federal agency for some type of action or resolution. This is very significant and important, because the current legislative scheme, while it theoretically protects the worker's right to speak out, does not provide a mechanism to ensure that the problems raised are adequately addressed.

Overall, Senate Bill 2095 is good public policy because it encourages the work force to report incidents that they are concerned about, which helps employers to prevent disasters, and enhances the Government's ability to enforce Federal laws and regulations.

It is difficult to imagine, Senator, that there would be any credible or significant opposition to this bill. Perhaps the lack of opposition here today is a testament to that. However, some opponents may raise a few issues regarding this bill.

First, they may say that this bill will allow disgruntled employees to protect their jobs simply by alleging a health and safety violation. Well, that's simply not true. Under the current scheme which would remain intact under your legislation, the case law provides that if an employer has a legitimate business reason for taking action against an employee, then the employer will prevail in this type of action. If, however, the employer's motives are mixed or improper, then the employee will prevail.

Next, opponents might argue that the bill is too expansive, that there is no need to cover all industries, and that Congress should take a step by step approach protecting individuals and industries as it is needed. Well, this is simply a poor response to the needs that we have today in this country. The need to prevent potential disasters from happening is something that is necessary in every industry and is something that is simply good public policy.

That is the conclusion of my statement, Senator. If you have any questions, I'd be happy to try to answer them.

[The prepared and supplemental statement of Mr. Condit follows:]

TESTIMONY OF RICHARD E. CONDIT
ON BEHALF OF THE GOVERNMENT ACCOUNTABILITY PROJECT

July 26, 1988

My name is Richard Condit. I am a Staff Attorney at the Government Accountability Project (GAP). I appreciate the opportunity to testify before the Subcommittee today on this very important piece of legislation.

GAP is a Washington, D.C.-based non-profit public interest organization, dedicated to advocacy on behalf of employees in both the public and private sectors. Most of our work at GAP involves issues of fraud, waste, mismanagement, or dangers to public health and safety. GAP was formed in 1977, and since 1985 has maintained a docket of 40 to 50 cases per year (approximately half of GAP's docket) involving employees from the private sector.

As practitioners in the area of labor law commonly referred to as "whistleblower protection," GAP strongly supports Senate Bill 2095. Fortunately, we are not alone in our support for this bill. To date, over 40 other organizations that we have contacted have enthusiastically provided their support. These supporters include national organizations such as: Environmental Defense Fund, Center for Science in the Public Interest, Public

Citizen, Consumer Federation of America, American Civil Liberties Union, Citizens for a Better Environment, and the Public Interest Research Groups (PIRGs) in Ohio, Minnesota, Alaska, Vermont, and New Mexico. The combined and associated memberships of these and other organizations supporting S. 2095 number over 50 million strong. I anticipate that the level of grassroots support will continue to grow over the course of the legislative process.

The testimony that you have heard today is not unusual. On a regular basis GAP is contacted by workers who believe that they have lost their jobs because they tried to do the right thing by reporting a perceived problem. Yet, oftentimes they cannot be helped because 1) their industry is not covered by any law or regulation that protects employees who report problems involving health or safety matters, or 2) even when they are covered they fail to file a complaint in a timely fashion. At the present time there are over 15 laws with whistleblower/employee protection provisions in them. Most of the environmental laws, such as the Clean Air Act, Clean Water Act, and Energy Reorganization Act provide only 30 days for an employee to file a complaint.

S. 2095 corrects the deficiencies in the current laws by providing a uniform definition of "protected activity" that encompasses every worker in the private sector who reports illegal or improper activities that may endanger public health and safety. This change would protect workers like Scott Buethe and Betty Simon, as well as others in the aerospace, food, pharmaceutical, airline, shipping, or other industries. There is no logical reason to exclude some workers and industries from basic protection. By encouraging members of the workforce to report such problems, Congress is nurturing the type of work environment that prevents disasters instead of ignoring them.

S. 2095 recognizes the need to establish a uniform statute of limitations of 180 days. As mentioned earlier, many of the laws containing whistleblower protection provisions only allow workers 30 days within which to file a complaint. This time period is entirely too short. Many workers cannot find legal representation within 30 days, so chances are good that they will miss the filing deadline. Two or three people every month contact GAP after their 30-day period has run out.

S. 2095 also goes a long way toward improving a worker's ability to obtain meaningful relief in an expeditious fashion. This is accomplished in several ways.

First, the bill provides a maximum of 360 days after receipt of a worker's complaint for the Secretary of Labor to complete the administrative process. This is important because the present structure does not ensure prompt resolution of complaints. For example, three workers from the South Texas Nuclear Project filed complaints under Section 210 of the Energy Reorganization Act in August and September 1986. Almost two years later their cases have failed to get to the hearing stage of the process. Even if they were to receive hearings this summer, it is unlikely that they would get a final decision from the Secretary of Labor much before the end of 1989.

Second, S. 2095 provides that the Secretary and Assistant Secretary of Labor as well as any administrative law judge assigned to conduct a hearing with subpoena power. The authority to issue enforceable subpoenas is essential if workers are to have meaningful hearings before the Department of Labor. An example will prove the point. In the case of Crosby v. Hughes Aircraft Co., 85-TSC-2, Mr. Crosby filed a complaint under the Clean Air Act (CAA) and Toxic Substances Control Act (TSCA), alleging that he had been terminated for engaging in activity protected by those Acts. In his attempt to establish his prima facie case, he subpoenaed four Hughes Aircraft executives to appear before a Department of Labor Administrative Law Judge. After several objections by counsel for Hughes Aircraft, the ALJ ordered that two of the four executives appear to give testimony. On the date scheduled for their appearance, counsel for Hughes informed the ALJ that the executives would not appear to give their testimony. The ALJ was virtually powerless to take action -- and he said so on the record. As a result, Mr. Crosby was unable to discover and produce evidence and testimony he viewed as central to his case. If the ability of complainants'attorneys and the Department of Labor to obtain information necessary to the adjudication of a complaint is severely hampered, as it was in Mr. Crosby's case, then the notion of whistleblower protection is a deception. Fortunately, S. 2095 will close this loophole in the process.

Third, S. 2095 provides that a whistleblower's substantive complaint(s) will be referred to the appropriate federal agency for investigation and possible action. This provision establishes, for the first time, a mechanism to ensure that responsible federal authorities are made aware of a whistleblower's concerns. For years now we have operated under a legislative scheme that protects whistleblowers from retaliation but fails to guarantee that the problems raised by the employee are addressed. This is a lot like putting the cart before the horse. In fact, many whistleblowers will tell you that they would not come forward with their concerns if they believed the problem would not be corrected. Therefore, the complaint referral provision has the dual effect of addressing the whistleblower's issue and encouraging reporting.

In conclusion, it is clear that Congress implemented the present employee protection scheme on a case-by-case basis. The obvious intent of these provisions is to involve members of the workforce in matters affecting public health and safety by encouraging them to report their concerns. Unfortunately, the current employee protection scheme fails to achieve its intent because many industries are not covered, there is no uniform definition of protected activity, the administrative process and procedures vary from statute to statute (creating apprehension and confusion about the enforcement of protections), and the whistleblowers have no guarantee that they can receive prompt relief or that the substance of their concerns will be addressed.

The UNIFORM HEALTH AND SAFETY WHISTLEBLOWER PROTECTION ACT (S. 2095) corrects these deficiencies and more. By enhancing the protection of members of the workforce who report problems, Congress can ensure a cleaner environment, safer workplaces, and generally greater protection of public health and safety.

Thank you.

GOVERNMENT ACCOUNTABILITY PROJECT
25 E Street, N.W., Suite 700
Washington, D.C. 20001
(202) 347-0460

SUPPLEMENTAL TESTIMONY IN SUPPORT OF S.2095
BY THE GOVERNMENT ACCOUNTABILITY PROJECT
Richard Condit, Staff Attorney
Bryan Decker, Staff Associate

In conjunction with the testimony that we gave before the Subcommittee on Labor on July 26, we would like to address several points made by Mr. Alvarez of the Department of Labor. Also, we would like to reiterate our total support for the Uniform Health and Safety Whistleblowers Protection Act.

The testimony of Mr. Alvarez on behalf of the Department of Labor (DOL) is disturbing to us, as it was to Senator Metzenbaum, because it refuses to draw conclusions or make alternative recommendations. However, although ambiguous, there are several questions raised in the testimony that we would like to address.

The first question raised by Mr. Alvarez is the scope of S.2095. S.2095 would extend coverage to protect employees in all private industries who make health and safety disclosures. Mr. Alvarez contends that the DOL supports expanding coverage to the airline industry, but that "(W)e need to obtain much more information" before supporting extending coverage to all industries. We feel that the need for extending coverage to all industries at the present time can be seen by using the airline industry as an example. Over the past several years, the airline industry has been the focus of much attention because of well publicised safety problems. As a result, members of Congress have introduced several bills to protect whistleblowers in the airline industry (at the present time, there are at least four such bills in the House). We feel that these "crisis management" bills are not the correct way to deal with the problem. It would be illogical to wait until problems arise within other industires before steps are taken to protect workers who wish to report their concerns. Indeed, if S.2095 had been in effect before the Challenger shuttle disaster, the aerospace industry would have been covered. If this had been the case, the two Morton Thiokol engineers who spoke out about the "O"ring problem to Congress and were then demoted would have had a legal avenue to challenge their demotion. If they had been successful in their claim, NASA would have been required to investigate the "O"ring problem, and the Challenger disaster may not have occurred. Congress should implement employee protection laws in order to prevent disasters, not as an answer to them.

The second question raised by Mr. Alvarez in his testimony is that S.2095 would take discretion away from the Secretary of Labor to allocate responsibilities for the investigation of complaints brought under the proposed legislation. We refute this claim by noting that although all complaints would go to the DOL under S.2095, the Assistant Secretary for Employment Standards Administration would retain the discretion to investigate all such claims. S.2095 does not eliminate the Assistant Secretary's discretion, but mandates that all claims be placed under one procedural mechanism. In this way, Congress can ensure that all whistleblower claims receive the same treatment.

Mr. Alvarez also contends that the increase in work on the DOL that S.2095 would create should be more throughly investigated before passing the law. Although some of the laws in question are now the jurisdiction of other agencies, the DOL should handle all complaints. The reason for this is that whistleblower complaints are ultimately a question of employee/employer relations that should be handled by the DOL. This would create an increase in workload for the DOL, but it is a logical increase needed for ensuring that all workers receive the same opportunity to be heard.

The third question addressed by Mr. Alvarez is the scope of Protected Conduct under S.2095. Mr. Alvarez notes that "under present law, an employee is required to first consult with the employer prior to refusing to work, a condition not specifically mentioned under proposed section 4(a)(3)." Although this appears to be a logical requirment, by expanding protection to internal whistleblowing, S.2095 gives employees the right to go to their employer first without fearing reprisal. In this way, S.2095 properly gives industry the first opportunity to correct a potential problem. The system of "self regulation" that would be set up by allowing internal whistleblowing makes good business sense, because it allows an industry to clean up its own act before the Federal government becomes involved. This also provides employees the right to try to have their safety concerns addressed before going to a Federal agency. This would save both the industry and the government time and money.

It is important that S.2095 address the "internal" whistleblowing issue, because under the current laws, specifically the Energy Reorganization Act, there is confusion on this issue. The Fifth Circuit, in Brown and Root v. Donovan, 747 F.2d 1029, 1032 (5th Cir. 1984), has held that internal whistleblowing is not covered, while all other circuits and the Secretary of Labor have concluded that it is. This has forced workers in the nuclear industry to deal with two different standards. The resut of this has been that workers are less likely to report a safety violation because of the confusion surrounding the issue.

The final question raised by Mr. Alvarez is the "exact relationship between protections under existing laws, and those that would be created by this legislation." We feel that this relationship has been clearly addressed by S.2095 when it states, "(I)t is the express intent of Congress to supersede the enforcement and administration procedures in applicable Federal laws by making the enforcement and administration procedures in sections 5, 6, and 7 the exclusive enforcement and administration procedures."(S.2095 Sec.8,(d)) In this way, S.2095 creates a uniform system for the resolution of whistleblower complaints. It should be noted that Federal employees would still be covered under existing laws, such as the Clean Air Act. By superceding the existing Federal laws for private employees, which are ineffective and haphazard, Congress has an opportunity to make the system more effective and efficient. Also, S.2095 expressly does not supercede any state laws that are or will be in effect, thereby setting up a minimum Federal standard for protection, which is the proper role for the Federal Government.

The fact that there was no opposition to the Uniform Health and Safety Whistleblowers Protection Act at the July 26 hearing is testiment to this legislation. By covering all industries, by consolidating investigation power in the DOL, by ensuring that internal whistleblowing is protected, and by superseding the present ineffective Federal laws, S.2095 makes giant strides towards the effective protection of employee health and safety reporting. The Government Accountability Project strongly supports this much needed legislation, and urges its expedient passage.

Senator **Metzenbaum**. Thank you very much.

It is always encouraging to me as a Senator that there are people such as you and the Government Accountability Project who devote themselves to this kind of activity and concern. There is a kind of selflessness about it; most of you make modest salaries, but certainly do not make the kind of money that it is possible to obtain in the private sector.

Let me just ask you a couple of questions.

Mr. Buethe, did you ever have any job-related problems prior to or after your employment with Britt Airlines?

Mr. **Buethe**. No, sir, I did not.

Senator **Metzenbaum**. Now, you refused two flights for Britt because the equipment did not meet minimum FAA safety standards. Do you believe those flights would have departed as scheduled if you had not objected?

Mr. **Buethe**. Absolutely.

Senator **Metzenbaum**. Given what happened to you, would you do the same thing again and would you tell other pilots to do what you did?

Mr. **Buethe**. I would have some reservations, Senator. Under those circumstances, I would have to warn the individual of the consequences, the risks that they were taking with their job.

I was in a position at that time where I was unmarried, with no children, and was able to take some risks with my job—and I also had other job skills which would allow me to go on if that were necessary.

Senator **Metzenbaum**. You could afford the luxury of being courageous.

Mr. **Buethe**. That is correct, sir.

Senator **Metzenbaum**. But if you had three children and a wife at home and wouldn't be able to bring home a paycheck, you'd have to really think a second time, wouldn't you?

Mr. **Buethe**. That is correct. That is the position that most of the pilots were in at that time.

Senator **Metzenbaum**. Mr. Masters, why did you wait three to four months before contacting a lawyer to file a complaint against your employer—just because you were moving and getting yourself re-established?

Mr. **Masters**. Well, when I left the site, I didn't realize—none of my concerns had been investigated yet, and I was unaware, through the campaign to cover up what I had reported—I did not realize I had a case against them.

Senator **Metzenbaum**. You had never had any problems with Daniel before this instance, did you?

Mr. **Masters**. No. When I left Wolf Creek, Kansas in August, I was certified in eight certifications for testing at a nuclear power plant.

Senator **Metzenbaum**. Would you do what you did again if you had the opportunity?

Mr. **Masters**. Yes, I would. I was trained for what I knew, and I was good at what I did, and I felt proud of my job, and I knew when I went to the NRC on February 1st that that was going to be the end of it, but I felt that they had done something intentionally wrong, and I could not sit by and let them get away with that.

Senator **Metzenbaum**. Do you feel the NRC let you down a bit after you reported to them and they didn't move in promptly?

Mr. **Masters**. Well, the NRC, of course, is just a reporting agency, more or less, to employees, and it takes them several months before they can even make a determination of what happened. It took them almost a whole year on my case just to reach the conclusion that they had falsified the prints and that there were structural pieces missing out in the field.

Senator **Metzenbaum**. Thank you.

Ms. Simon, on your job, were the employees supposed to cooperate with the Federal inspectors?

Ms. **Simon**. Yes, sir. In order to trim the birds properly or grade properly, you have to know what is expected by the Federal Government.

Senator **Metzenbaum**. And your husband worked as a security guard at the same plant. I understand he was also fired after blowing the whistle on the company. How is his case different from yours?

Ms. **Simon**. Basically, it isn't different. He was fired by the company the same way they could fire me or anyone else. But he had the opportunity to go through the EPA laws, and they used that in his case.

Senator **Metzenbaum**. And the Federal inspector who seemed to be willing and concerned about the problems at the plant as you reported them to him, he also wound up being moved and harassed?

Ms. **Simon**. The plant grader was, yes. We lost him; we lost the veterinarian; we had several of our inspectors who were harassed and written up.

Senator **Metzenbaum**. Do you think the company had some influence on moving the grader and the vet?

Ms. **Simon**. Yes, sir. I know for a fact that they had influence on what happened to the grader.

Senator **Metzenbaum**. Do you know precisely what happened?

Ms. **Simon**. Yes, sir.

Senator **Metzenbaum**. What happened?

Ms. **Simon**. They called; they made complaints against him, said he was too zealous in his job, and they made a complaint of sexual harassment against him to his employer, and this brought about an investigation which proved that he did not do any of these things, but he was still harassed into retiring from his job.

Senator **Metzenbaum**. When did that happen?

Ms. **Simon**. That was in 1985.

Senator **Metzenbaum**. Do you know where that Federal grader is today?

Ms. **Simon**. Yes, I do.

Senator **Metzenbaum**. Is he working?

Ms. **Simon**. No, he isn't; he is retired.

Senator **Metzenbaum**. And was that by reason of giving up the cause just because of what had happened to him on the job?

Ms. **Simon**. No. I don't think the man will ever give up the cause. He isn't that nature of a person. I have a great deal of respect for him because he did what he felt was right.

Senator METZENBAUM. I understand my staff is in touch with him.

Were other employees in the plant afraid of personal reprisal if they cooperated with the Federal investigators?

Ms. SIMON. Definitely, yes.

Senator METZENBAUM. Mr. Condit, what are the particular difficulties in representing private sector whistleblowers under the current Federal statutory scheme?

Mr. CONDIT. Well, Senator, there are several problems. First is the issue of coverage. Workers like the witnesses you have heard today are not protected, which I think is a very important role that needs to be played in this legislation.

Second, under the current scheme, it is not clear whether the Department of Labor has subpoena power to compel testimony and evidence. This can be a great disadvantage to complainants who are trying to adjudicate their claims, and one case in point will serve as an illustration of this problem.

A whistleblower from California at the Hughes Aircraft Company, Patrick Crosby, had raised concerns under the Clean Air Act and Toxic Substances Control Act and, during the course of his administrative proceeding, properly subpoenaed four executives from Hughes Aircraft to get their testimony about their knowledge and involvement in his dismissal. After a number of objections by Hughes' counsel, the administrative law judge decided that he would compromise and provide that only two of the executives needed to attend and provide their testimony. Well, on the day they were scheduled to testify, they did not appear, and Hughes aircraft attorneys simply said that they would not appear. The administrative law judge was essentially helpless to take any action to enforce his order to have them appear, and as a result, Mr. Crosby was not able to prosecute his case in a way that would allow him the advantages under the law.

Senator METZENBAUM. Thank you very much, Mr. Condit.

I want to thank each of the witnesses. I have been recognized in years past by the Consumer Federation of America for awards; I really believe the awards belong to people like you, and I am going to suggest to them that they give consideration to making their awards to some of you who have had the courage to stand up and speak out and jeopardize your own jobs and, in each instance, lose your own jobs. I think you are truly the heroes that a consumer-oriented group ought to recognize, and I am going to suggest that to them.

Thank you all very much for your participation.

We will have a two-minute recess and then proceed forward.

[Short recess.]

Senator METZENBAUM. The hearing will come back to order.

Our next witness is Mr. Fred Alvarez, Assistant Secretary for Employment Standards Administration, U.S. Department of Labor.

Mr. Alvarez, we are very happy to have you with us here this morning. I think you heard our suggestion that we confine our remarks to five minutes, so if you'll just speak up loudly and clearly, and we are very grateful to you for being with us this morning, sir.

STATEMENT OF FRED W. ALVAREZ, ASSISTANT SECRETARY FOR EMPLOYMENT STANDARDS ADMINISTRATION, U.S. DEPARTMENT OF LABOR, WASHINGTON, DC

Mr. ALVAREZ. Thank you for the invitation.

My name is Fred Alvarez. I am the Assistant Secretary of Labor for the Employment Standards Administration.

I want to thank you, Senator, for the opportunity to participate in the process of examining this bill as a possible vehicle for addressing the issues of consistency in whistleblower protection that were raised by the Administrative Conference Report of last year, raised by this bill, and have been raised by other people.

It certainly was a compelling panel of witnesses, and I am glad I had the opportunity—well, I'm not glad I had the opportunity to hear that those kinds of things occur in the country, but hopefully it will help deal with some of those issues.

I am sorry as well that the Solicitor isn't here, who has more substantive command over this area, but I'll do the best I can; I am responsible for a portion of the whistleblower protection that currently exists.

But we felt it was more important to contribute to this introductory hearing the Department of Labor's approach to its own whistleblower responsibilities and to try to supply the Subcommittee with some basic information on our own experience in the area and raise some of the issues that the Subcommittee ought to consider as it proceeds down this path.

In the interest of time, obviously, I won't read our extensive testimony; it is in the record——

Senator METZENBAUM. Each of the witnesses' testimony will be included in the record in its entirety.

Mr. ALVAREZ. I appreciate that, sir.

Therefore, I'll just make three quick points to summarize our feelings. The first is that we at the Department recognize the need to address consistency in application and process in this area. The bill that we are discussing here today does that. The Administrative Conference Report that you will hear about later on does that. And we at the Department feel that those issues are important as well.

The Secretary has identified consistency in enforcement as one of her principal objectives. We've got activities going on at the Department that are designed to do that sort of thing. So we all recognize some need for consistency in an enforcement area that is as critical as this.

Secondly, I would suggest, however, that there would be a need to retain some Secretarial discretion in where this work is done within the Department. There seems to be the argument—which I think is a reasonable one—that consistency and consolidation go together. That may not be true in all circumstances. And we would ask that the Committee consider whether the Secretary needs to have the work directed to a particular place or whether the Secretary should take the responsibility for where the work within the Department ought to be done.

I would note that even the Administrative Conference Report, in recommending that the work be transferred to a single entity within the Department, suggested that compelling reasons may exist so that the work be divided in various parts of the Department as long as the Secretary was responsible for consistency.

And the final point, sir, is that I am here to offer to continue to work with this Subcommittee in this area, because I sense that we are pulling in the same direction toward consistency in application and enforcement of a very important area. We have a lot of experience in the whistleblower protection area now in the portions that Congress has granted to us for protection. And we feel that having to live with a variety of systems and application processes that it makes things more difficult than perhaps they need to be.

So I sense that as you consider this bill over time, that we can continue to work together with the Committee and the Committee staff as we try to sort out this patchwork that has been eloquently described by you and others.

So with that, sir, I'll be happy to answer any questions you may have.

[The prepared statement of Mr. Alvarez follows:]

STATEMENT OF
FRED W. ALVAREZ
ASSISTANT SECRETARY OF LABOR FOR
EMPLOYMENT STANDARDS
before the
SUBCOMMITTEE ON LABOR
LABOR AND HUMAN RESOURCES COMMITTEE
UNITED STATES SENATE

July 26, 1988

Mr. Chairman and Members of the Subcommittee:

I am happy to be here this morning. The Department of Labor agrees that some legislation may be appropriate to address the issues raised by the Administrative Conference of the United States (ACUS) in its report on safety and health whistleblower laws. We do, however, have some serious questions about the vehicle which is the subject of this hearing, S.2095 -- such as the scope of coverage and the effect on existing statutes -- and would like to work actively with you to address those questions.

In order to begin that process, much of my testimony this morning is oriented toward providing this Subcommittee, and other interested parties, with an overview of those Federal safety and health whistleblower laws covering private sector employment currently administered by the Department of Labor. I should say right at the beginning that the Employment Standards Administration (ESA) only administers some of the laws I will be discussing this morning. However

I will do my best to provide you with some information about all of the Department's activities.

I will begin by reviewing the scope of these laws. Gaps and overlaps in these programs are among the subjects addressed by the Administrative Conference. Thereafter, I will try to provide an overview of our investigatory and adjudicatory procedures -- including information on the role of various Departmental components and on our current workload. Lack of consistency in this regard was another of the subjects addressed by the Administrative Conference. I will also seek to distinguish between that conduct which is protected under these laws and that conduct which is not protected. This subject was not addressed by the recommendations of the Administrative Conference, but is important in assessing the provisions of the proposed legislation.

Summary of the Department's Current Programs

Scope

Let me begin by noting that the Department of Labor currently administers almost a dozen programs whose primary focus is to protect private sector safety and health whistleblowers. By far our largest program is section 11(c) of the Occupational Safety and Health Act of 1970. It protects employees covered by OSHA who report hazards that could adversely affect employee safety and health. Two other programs protect whistleblowers in the mining and commercial trucking industries. The latter, our most recent program, was established in 1983 by the Surface Transportation Assistance Act. Most of the other programs protect whistleblowing about various types of environmental hazards, ranging from nuclear hazards (including those at TVA facilities) to water pollution. Citations to all these programs, and to their regulations, are attached to my written statement.

This is not the complete universe of Federal whistleblower protection programs. As the Subcommittee is aware, there are several safety and health whistleblower programs administered by other Departments or Federally-created entities. Among these are a program that protects employees who participate in Federal proceedings in connection with surface mining and reclamation standards, and another that protects railroad employees.

There are also other Federal laws that protect whistleblowing conduct. Such conduct may include safety and health matters, but that is not their primary focus. One example is the laws that protects whistleblowing by Federal employees, although some of our programs cover Federal employees as well. Another is the law that protects those who expose false claims on government grants or contracts. In addition, the Department of Labor itself is responsible for administering a number of laws that include whistleblower protection for employees who report violations of those laws. These include several employment standards laws -- the Fair Labor Standards Act, the Migrant and Seasonal Agricultural Worker Protection Act, and the recently enacted Employee Polygraph Protection Act -- as well as the Job Training Partnership Act, the Employee Retirement Income Security Act and the Longshore and Harbor Workers' Compensation Act. Then too, there are related Federal rights under the National Labor Relations Act and under Title VII of the Civil Rights Act. My focus for the moment, however, will be on the statutes we administer which specifically focus on safety and health whistleblowing by private sector employees.

As indicated by the Administrative Conference, there are gaps in the coverage of these laws. The exact scope of the current programs is still being established by litigation. Nevertheless, we support legislation to create a special safety and health whistleblower program for the airline industry. We have also concluded that it is appropriate for the Department of Labor to be the agency charged with administration of this program, and that we can absorb the additional costs associated with such a program. Whether it is appropriate to fill additional gaps is a matter I will discuss later in my statement.

Investigations

Investigation of a complaint alleging retaliation involves ascertaining whether an individual was engaged in protected whistleblowing and whether such conduct was a basis for an adverse employment action. The Wage and Hour Division of the Employment Standards Administration presently investigates complaints under the environmental programs (as well as violations of the employment standards programs). Investigations of alleged violations of the OSH Act and trucking industry whistleblower provisions are carried out by specialists within the Occupational Safety and Health Administration (OSHA). MSHA investigations are carried out by specialists within the Mine Safety and Health Administration (MSHA).

Let me describe how we perform such investigations in ESA. Before we can take any action, we require a complaint to be in writing and signed by the party requesting an investigation. If the conduct appears to be protected, a copy of the complaint, our regulations, and the applicable law are sent to the alleged violator, with a copy to the responsible regulatory agency (the Nuclear Regulatory Commission or the Environmental Protection Agency, for example). The letter notes our obligation to investigate the matter.

Because of statutory deadlines, the complaints are given immediate priority in handling. While these time frames pose constraints on our ability to seek conciliation, we always make that effort. If settlement fails, the adversary parties and any corroborative witnesses are interviewed, and personnel records and other pertinent documents examined if appropriate. Moreover, the employer is asked to submit any evidence refuting the complaint. Upon completion of the investigation, and after discussion with the Area Director, the findings are promptly sent to the parties.

In Fiscal Year 1987, ESA conducted 75 investigations (3.5 staff years). During that same period, Federal OSHA conducted 2,677 whistleblower investigations under the OSHA statute (57 staff years). I would note in this regard that as with all protections under the OSH Act, complaints of retaliation due to whistleblowing protected under the OSH Act are investigated (and adjudicated) by State authorities in those States with approved State plans. OSHA also conducted 248 investigations under the trucking statute (7 staff years). MSHA conducted 234 investigations during the same period (16.2 staff years). This is an overall total of 3,159 Federal investigations in Fiscal Year 1987, utilizing 83.7 staff years, for these DOL safety and health whistleblower programs.

The Department has been examining the question of how investigative activities under these programs could be consolidated within the Department, as recommended by the Administrative Conference of the United States (ACUS). In our view, it would be wrong to simply stick these programs one place or another just to say we have achieved consolidation, as this might do more harm than good. Indeed, there may be historic or other reasons why we might want to have more than one agency involved. We are examining the type of staff expertise necessary and appropriate to carry out these investigations, overall agency missions, the possible scope of such a program beyond our current mandates, and other relevant factors. We have not as yet reached a conclusion about these matters. We believe strongly, however, that the decision as to the appropriate assignment of such responsibility within the Department should be left to the discretion of the Secretary of Labor.

Adjudication

Where a case is not withdrawn or settled, formal procedures for adjudication are required, and relief may be ordered. Under all the statutes administered by DOL, relief includes reinstatement -- and, under the trucking and mining programs, this includes temporary reinstatement during the pendancy of adjudicative proceedings. Relief may also include restoration of back pay, status and benefits. In addition, some of the programs provide for interest, legal fees, and compensatory and exemplary damages.

The procedures for adjudication vary significantly from program to program. In the case of the OSH Act, determinations are made initially by Federal district courts on actions brought exclusively by, and at the discretion of, the Secretary of Labor. (25 such actions were brought in FY 1987). In the case of the MSH Act, determinations are by the independent Federal Mine Safety and Health Review Commission following hearings before FMSHRC administrative law judges: either on the basis of actions brought by the Secretary, or on the basis of actions brought by the claimant. 91 such actions were disposed of in Fiscal Year 1987. In the case of the trucking industry and environmental programs, determinations are made by the Secretary of Labor following a hearing before one of the Department's administrative law judges, upon the request of either party. The Secretary has established the Office of Administrative Appeals to assist in the preparation of the Secretary's decisions under these programs. Appeals under all of these programs is to the Circuit Courts. Resources devoted to adjudicatory activities by the Department under the safety and health whistleblower programs in Fiscal Year 1987 include about 40 staff years by the Office of the Solicitor, 9 staff years by the Office of Administrative

Appeals, and 13 staff years by the Office of Administrative Law Judges.

The Department has been examining what procedural arrangements would provide the best approach for resolving complaints under a consolidated program. Elements include the appropriate forum, statutes of limitations, timeframes for various actions, aspects of relief, representation of the parties, and many details about the mechanisms used to make findings of fact and conclusions of law in these cases.

We have reached some tentative conclusions in this regard -- e.g. that we favor the use of an administrative decision-making system over a court system. We will need to carefully consider potential workload, however, before we can take a position on any of the details. This, of course, is dependent on a better understanding as to the extent to which coverage of our existing programs would be expanded and the likely utilization rate by different groups.

Conduct protected

Of critical importance in whistleblower programs is the ability to distinguish between that type of conduct which is protected and that type of conduct which is not protected. As a general rule, we would certainly agree that conduct that helps to eliminate real safety and health hazards should be protected, and that we want to foster an environment in which employees are not discouraged from bringing potential safety violations to the attention of their employers -- those who are in the best position to eliminate the problem. I assume we would also agree that we do not want to interfere unduly with internal employment actions, and that we do not want to protect those who might seek to use available whistleblower procedures solely to harass employers. The challenge is to balance these goals in real-world situations: to make the distinctions between cases, to analyze their implications, and to apply to them the always inherently general provisions of any statute.

Because the proposed legislation would appear to be protecting much of the same conduct as under some of our present programs, I would like to provide you with a number of examples as to how the balance of which I spoke has been accomplished under those programs. Such information can then form the basis of a dialogue as to whether we wish to strike the same or some other balance in the proposed legislation.

All of the whistleblower programs administered by the Department explicitly protect the disclosure by employees of safety and health hazards directly to the appropriate Federal agency, and participation by employees in formal government proceedings in connection therewith. This formulation, however, has left the Secretary and the courts with many questions to address.

One question is whether an employer can take adverse action against an employee who engaged in whistleblowing but who also engaged in unrelated conduct which would warrant adverse action. The tests which have been used to decide such cases are based on tests used under Title VII of the Civil Rights Act and the National Labor Relations Act.

The first thing we look at is whether the employee carries the burden of proving, by a preponderance of the evidence, that retaliation for protected activities was a motivating factor in the decision to take adverse action. In the case of Lockert v. Pullman Power Products, 85-ERA-15, for example, the Secretary affirmed findings by an administrative law judge that an employee had not proved that he was discharged in retaliation for protected activities. In that case, the employee was given a warning about being absent from a workplace for protected conduct, but was discharged after a second absence which was not for such conduct.

The second thing we look at is whether the defense offered by the employer is pretextual. In Francis v. Bogan, 86-ERA-8, the Secretary affirmed findings by the ALJ that an employee, dismissed after repeated expressions of concern to his employer about the quality of testing packages used in calibrating equipment at a nuclear power reactor, was fired for protected conduct. In this situation, the reasons given by the employer for the dismissal were clearly contradicted by other facts.

If the employee has established that protected whistleblowing was a factor in the employer's actions, and the employer's rationale for his action is more than pretextual, the burden of proof shifts to the employer who must establish that it would have taken action against the employee even if the protected conduct had not occurred. In Mackowiak v. University Nuclear Systems, Inc., 735 F.2d 1159 (9th Cir. 1984), this "dual motives" test, already applied by the Supreme Court to other types of cases, was applied to a quality control inspector at a nuclear power plant who had made repeated safety and health complaints. The employer alleged that the employee was being dismissed as a result of "attitudinal problems". The court upheld the Secretary's application of dual motive analysis to environmental whistleblower cases, and ordered the Secretary to review the record to distinguish those "attitudinal problems" caused by the whistleblowing and those that were not.

In a similar situation, the Fifth Circuit found that an employee whose conduct would have been otherwise protected abused his status by becoming insubordinate, thus giving the employer a legitimate reason for the dismissal. (Dunham v. Brock, 794 F.2d 1037 (5th Cir. 1986)).

In addition to these rules, it is noteworthy that the environmental whistleblower statutes specifically exclude from protection disclosure of hazards deliberately caused by the employee, and that the OSH Act excludes from protection those employees who refuse to comply with safety or health standards or employer safety or health rules.

Another question is whether an employee is protected from retaliation by an employer if, instead of blowing the whistle to the government, the employee reports a hazard directly to the person who in many cases is in the best position to evaluate and eliminate it -- the employer. The MSHA statute explicitly provides such protection, but the other whistleblower statutes are not explicit on this point. Under the OSHA and trucking industry whistleblower provisions, however, it has been established by decision that such an employee is in fact protected from retaliation. The circuit courts are split on this question, however, under the environmental law. In Brown & Root v. Donovan, 747 F.2d 1029 (1984), the Fifth Circuit found that a quality control inspector dismissed after he issued several noncomformance reports on weld integrity in a nuclear power plant was not protected because the whistleblower law did not explicitly include protection against internal complaints. However in Mackowiak v. University Nuclear Systems, cited above in another context, the Ninth Circuit held in very similar circumstances that such protection was inherent in the whistleblower law, on the basis that for the regulatory scheme to protect safety and health, inspectors must be free from the threat of discharge. The Tenth Circuit also takes this position (Kansas Gas & Electric v. Brock, 780 F.2d 1505 (10th Cir. 1985), and the Secretary follows this position.

Another question is whether employees are protected from retaliation if, instead of complaining about a hazard to the appropriate Federal agency, they instead advise co-workers, relatives, union representatives, or the media. The OSHA program has been specifically interpreted by the courts to protect employees in all these cases. A summary of these decisions can be found in Donovan v. Diplomat Envelope Corp., 587 F.Supp. 1417 (E.D.N.Y. 1984). The same is true under MSHA. These questions have not generally been considered yet under the Department's other whistleblower programs.

Another question concerns the extent to which an employee will be protected when his complaint turns out, upon investigation, to be unwarranted. The statutes do not explicitly state whether an employee must be correct in his allegation that a hazard exists in order to be protected against retaliation. Our practice under those laws, however, is not to require that an employee be a safety or health expert, and thus able to determine whether the conditions he or she observes in fact violate a particular law or regulation. To do so would chill reports of whistleblowing. At the same time, however, an employee who does not have a reasonable, good-faith belief that the situation could be hazardous is not going to be able to satisfy his burden of proof that any adverse employer action was based upon protected conduct. Accordingly, truly "frivolous" complaints are not protected. Whether a complaint is "frivolous" or involves a good faith but incorrect assessment of a potential hazard depends, of course, on the facts of the case.

Another difficult question is whether these laws prevent an employee from having to elect, on the spot, whether to carry out an assignment that might cause death or serious injury to themselves or to others or whether to risk adverse action by refusing to carry out such an assignment. In the case of Whirlpool Corporation v. Marshall, 445 U.S. 1 (1980), the Supreme court unanimously upheld an OSHA regulation interpreting the OSHA whistleblower provision to provide that an employee need not make such an election. In that case, two employees were asked by a supervisor to walk on a mesh netting above the shop floor to conduct some maintenance operations, even though an employee had recently been killed falling through the netting, the employer had ordered the mesh replaced, and the employer had in fact forbidden walking on the netting until the replacement was completed. When the employees refused to perform the assignment, they were sent home for the remainder of their shifts and received a reprimand. In upholding the OSHA regulation, the Supreme Court noted that although no specific right to refuse to work was included in the statute, the Secretary's interpretation of work-refusal as a protected activity was consistent with the underlying purpose of the OSH Act.

To exercise this right of protection from retaliation, an employee must have a reasonable good faith belief that the situation involves a risk of death or serious physical injury. It is important to note that the law does not protect an employee whose fear is unreasonable. Management judgment is not subordinated to the beliefs of individual employees. For example in the case of Smith v. Catalytic, 86-ERA-12, the Secretary affirmed a finding by an ALJ that an employee worried about possible "contamination" at a nuclear power facility could be dismissed for refusing to return to his duties based on evidence that the employee should have known, as a result of training and other factors, that he had not been harmed. It should be noted that the right to cease work under such circumstances is not explicit under the environmental statutes, but has been found protected by the Secretary based upon the legislative history.

A similar right exists under the MSH Act, and a rule appropriate to the specific circumstances of the trucking industry was explicitly set forth in the Surface Transportation Assistance Act.

The Proposed Legislation

As I have indicated in this review of our activities, legislation could bring about more consistency in how we administer these laws, and eliminate some gaps that fit naturally into the current scope of our activities. We have a substantial body of law, involving principles used in many other legal contexts, upon which to draw in fashioning the appropriate legislation.

As I noted earlier, we do, however, have some serious questions about the vehicle which has been put forth to implement those recommendations. Let me summarize the key ones here:

1) Scope - S.2095 is drafted to have an extremely broad reach. Safety and health matters that come up under a whole range of Federal regulatory programs, other Federal

activities, and even the Constitution fall within its ambit. As I indicated, the Department of Labor has concluded that it is appropriate for it to handle at least one apparent gap in existing coverage, the airline industry, and that we have the resources to undertake that specific task. We need to obtain much more information about the intended scope of S.2095, however, before we can decide whether all such authority should be created and whether it should be vested in the Department. We will, for example, need to see if some safety and health complaints are already being effectively addressed under other whistleblower protections, such as those covering the employees of military contractors.

2) Inspections - As I also indicated, we are still studying how best to consolidate investigative authority, and whether more than one agency should be involved. While we certainly welcome any views on the matter, let me repeat that we believe the ultimate decision as to the allocation of responsibilities within the Department must rest with the Secretary. S.2095, I would note, would take this discretion away from the Secretary.

3) Adjudications - Although we have reached some tentative conclusions as to what type of adjudicative provisions we believe are most effective and efficient among the types now used in our programs, we will need to consider the potential

workload involved before reaching any conclusions about the suitability of the adjudicatory provisions proposed by S.2095.

4) Protected conduct - As I noted, in many respects S.2095 appears to be seeking to protect whistleblowing conduct to an extent similar to that under some of our current programs. The range of employer activities which may be disclosed under proposed section 4(a)(2), however, may go too far. That section provides that assistance or participation in a proceeding with respect to any "activity, policy, or practice of an employer that the employee reasonably believes creates a danger" is protected. We believe that, as under existing whistleblower statutes, such protection should be limited to proceedings involving the Federal laws alleged violations of which are protected disclosures. Moreover under present law, an employee is required to first consult with the employer prior to refusing to work, a condition not specifically mentioned under proposed section 4(a)(3).

Further, there are issues here which, although settled under current law, we believe may be appropriate to reexamine carefully in the context of broader legislation. One such matter is seeking to ensure that employers, who are in the best position to eliminate safety and health hazards that occur in the workplace, in discharges from the workplace, or in products produced in the workplace, have an opportunity to do so, while ensuring that we do not create a chilling effect on whistleblowing.

Finally let me note that although our review of the bill is not complete, we have already noted a number of other matters that need to be carefully considered, and no doubt there will be others. The exact relationship between protections under existing laws, and those that would be created by this legislation, is one example. And, as I indicated previously, the impact of the proposed legislation on OSHA state plans needs careful examination.

Mr. Chairman, this completes my prepared statement. I would now be pleased to answer any questions you may have. Thank you.

Department of Labor Safety and Health
Whistleblower Protection Programs
Citation Table

Environmental Statutes 1/

Clean Air Act (CAA), 42 U.S.C. 7622 (1977)
Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. 9610 (1980)
Energy Reorganization Act (ERA), 42 U.S.C. 5851 (1978)
Safe Drinking Water Act (SDWA), 42 U.S.C. 300j-9(i) (1974)
Solid Waste Disposal Act (SWDA), 42 U.S.C. 6971 (1976)
Toxic Substances Control Act (TSCA), 15 U.S.C. 2622 (1976)
Federal Water Pollution Control Act (WPCA), 33 U.S.C. 1367 (1972)

STAA -- Surface Transportation and Assistance Act, 49 U.S.C. 2305 (1983) 2/

11(c) -- Occupational Safety and Health Act, 29 U.S.C. 660(c) (1970) 3/

MSHA -- Federal Mine Safety and Health Act, 30 U.S.C. 815(c) (1977) 4/

ISCA -- International Safe Containers Act, 46 U.S.C. 1506 (1982).

1/ Delegated by Secretary's Order 7-87 to the Assistant Secretary for Employment Standards (ESA), and in turn delegated to the Wage and Hour Administration (WH). The same Secretary's Order states that similar programs are automatically assigned to ESA. Consolidated DOL regulations at 29 CFR Part 24 apply by specific provision to 6 of the statutes, and by Secretary's decision to CERCLA. The Secretary applies the same rules of law to all 7 unless the statute or history dictates otherwise, so precedents for any are good for all. The Nuclear Regulatory Commission also has whistleblower regulations on ERA at 10 CFR 50.7, which direct employees to file complaints with DOL.

2/ Delegated by Secretary's Order 9-83 to the Assistant Secretary for Occupational Safety and Health (OSHA). Regulations at 29 CFR Part 1978.

3/ Delegated by statute to the Assistant Secretary for OSHA. Regulations at 29 CFR Part 1977. Since OSHA also administers the STAA whistleblower provision, the one in the OSH Act will be referred to as 11(c), its section number in the OSH Act.

4/ Delegated by Secretary's Order 3-78 to the Mine Safety and Health Administration (MSHA). DOL/MSHA have no regulations on this subject. Some procedural regulations have been issued by the Mine Safety and Health Review Commission (MSHRC), 29 CFR 2700.40 et seq.

Senator **Metzenbaum**. Thank you very much, Mr. Alvarez.

My staff tells me that you have been cooperative in the past, and we are looking forward to working with you. Let's all recognize that the clock is running as far as the conclusion of this Session is concerned, and so I think it is necessary that my staff as well as minority staff as well as yourself, that we all expedite the process because this Senator has intentions of moving this bill during this Session of the Congress. So I would suggest that we wait until maybe 20 minutes after the hearing before we start working together and putting the pieces on the road.

The Administrative Conference Report included recommendations to the Congress and to the Secretary of Labor. The recommendations to the Secretary related to the rules of appellate procedure, consolidation of investigation authority, coordination with substantive agencies, and publication of whistleblower decisions.

Has the Department done anything yet to implement any or all of those recommendations?

Mr. **Alvarez**. I don't believe so, sir. Obviously, we read the report when it came out; we decided at the Solicitor's level to develop a working group of staff people to focus on the issues. In the interim, of course, we have had a new Secretary who brought another interest in consistency, developed an Enforcement Task Force that focused on those issues at a broader level in the Department. But we have not proceeded to implement those implementations in the year or so since the report has been issued.

Senator **Metzenbaum**. Incidentally, I think you ought to try to expedite that because there, too, there is a question of how long this Department of Labor will be extant under its present leadership, and I would urge that that be discussed at the highest levels to see if we can't make some progress during this period of time.

Mr. **Alvarez**. I'll be happy to, Senator.

Senator **Metzenbaum**. The Department favors extension of coverage to the airline industry. What about the other industries currently not covered, such as maritime, food and drug, and consumer products? Why did the Department single out aviation?

Mr. **Alvarez**. Well, the Department hasn't taken a position in those areas because, with the exception of this bill, which brings blanket coverage, we haven't, that I am aware of, the vehicles to discuss them. When the FAA bill came along, we joined with the FAA, which is the underlying substantive regulatory agency, to support that gap in coverage there. But there has not been——

Senator **Metzenbaum**. Do you think the legislation, whatever is enacted, should be broad enough to cover airline, maritime, food and drug, and consumer products?

Mr. **Alvarez**. Well, sir, I can't take a position on anything other than the bill we have already supported and the consistency issues that are raised here.

Senator **Metzenbaum**. Would you advise the Secretary we would like to know her position on that point?

Mr. **Alvarez**. I'll be happy to discuss it with her——

Senator **Metzenbaum**. Thank you.

Mr. **Alvarez** [continuing]. But I would suggest to you, sir, that the regulatory agencies themselves who cover those areas and who Congress has granted the exemption, as it were, are very critical players in that discussion. I am sure the Secretary would approach it from an enforcement standpoint, but the parts of the Government who are responsible for the underlying regulation, I think, are equal partners in that discussion.

Senator METZENBAUM. Let me just conclude by saying that the Administrative Conference had a public hearing on this issue in October 1986, issued its report in June of 1987. The Department set up a task force to respond to the report in August 1987. And I introduced this bill in February 1988.

The Department has not responded to the Conference, and you testified the Department must study S. 2095 in greater detail. I want to work with the Department on this bill, but I have to say to you that tempus fugit, and that this Senator understands the stall and delay that would appear to be the fact and the reality.

My bill has been in for a number of months. The Administrative Conference Report was made quite some time ago. I would just say to the Department of Labor that we want to work with you, and we don't want to be jumping all over your back, but I would not hesitate to do so if we can't get some expedited responses.

Can you give us any assurance—staff has suggested a question to you, but it is not as strong as I would like to go—when can we get a response from the Department of Labor?

Mr. ALVAREZ. On what issue, sir?

Senator METZENBAUM. On the question of whether you will support this legislation, and if you don't, what portions of it you can support, what portions of it you can't support. Let's face it—it's a piece of legislation that tracks the Administrative Conference Report and recommendations, so if an arm of Government is saying that we're still studying it, it doesn't really fly well. And I guess what I am asking you is can we get some assurance that the Department of Labor will give us a response very shortly?

Mr. ALVAREZ. Sir, I will discuss this with the Secretary when she gets back next week. I cannot make a commitment as to when we will have an answer done. I will suggest to you again, sir, that we are the enforcement side. I think our comments will properly be limited to the enforcement issues, the consistency and process issues. But I just don't think it will be within our ultimate decisionmaking power about whether the underlying gaps in coverage that I think you eloquently displayed here this morning ought to be resolved through the vehicle of this statute.

Senator METZENBAUM. Where is the Secretary of Labor coming back from?

Mr. ALVAREZ. She is overseas this week.

Senator METZENBAUM. Let me point out that after that comes the Republican National Convention, and now we get way down into August. Would you send her or her top aide an urgent memo, saying that we are pressing for some response?

Mr. ALVAREZ. I'll be happy to do that.

Senator METZENBAUM. All right. Thank you very much, Mr. Alvarez.

Mr. ALVAREZ. Thank you, sir.

Senator METZENBAUM. Our last panel consists of Marshall Breger, Chairman of the Administrative Conference of the United

States, and Eugene Fidell, an attorney with Klores, Feldesman and Tucker, Washington.

Mr. Breger, it is nice to see you again, sir.

I think you know our five-minute rule. We will be very happy to hear from you, and I want to commend you on the fact that the Administrative Conference of the United States made the recommendation that it did.

Please proceed.

STATEMENTS OF MARSHALL J. BREGER, CHAIRMAN, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, WASHINGTON, DC, AND EUGENE R. FIDELL, ATTORNEY, KLORES, FELDESMAN AND TUCKER, WASHINGTON, DC

Mr. **Breger**. Thank you, Mr. Chairman. It is a pleasure to be here and always a pleasure to appear before you, Mr. Chairman.

I realize that time is short—as you said, tempus fugit—so I will be brief to give an opportunity for Q and A.

Let me first say that the Conference takes no position on the substantive areas of coverage of this bill; we cannot, because we lack the expertise. What we have said is that it is obvious on a perusal of the various statutes that there are gaps and that some of these gaps may not be rationally explainable; and therefore, we think it is appropriate for Congress to review the area from a full position, looking at the forest as well as the trees, to see whether or not the existing gaps have reasons behind them.

Our proposals have focused on the procedure for the administration of whistleblower complaints, and we are delighted that S. 2095 tracks in large measure the Conference recommendations.

I want to touch on three points only. First, the need for uniformity in these procedures. Frankly, there is a Balkanization of procedures in the whistleblower protection area. Each bill as it grew up, each area of coverage as it grew up, created its own procedures, and we think it is important that there be single and uniform procedures. It makes it easier for everybody, the enforcement agency, the whistleblower, and even a company that is alleged to have engaged in improprieties.

Secondly, we think that as a matter of efficiency, there needs to be a centralization of enforcement. There is no need to have the number of enforcement agencies that you now have. We suggest the Department of Labor as the repository only because they have the large majority of cases already in the Department. There is no other reason other than that for suggesting the Department, but we think that efficiency would urge that you have a single centralized unit.

And thirdly—and I have to stress this—we think the uniform time limit to file of 180 days is very, very important. At present, in the nuclear area, you have 30 days to file; in the mine area, you have 60 days to file; in the agricultural area, you have 180 days to file. You cannot expect a worker who has been fired or otherwise disciplined to learn fully about the options available to him in 30 days. I'm not sure you could expect him to do that in 60 days. And we think that a 180-day time limit on filing is appropriate.

Let me stop now, and I am happy to answer any questions you may have.

[The prepared statement of Mr. Breger follows:]

Testimony of

Marshall J. Breger
Chairman
Administrative Conference of the United States

before the
Senate Committee on Labor and Human Resources
Subcommittee on Labor

on S. 2095

The Uniform Health and Safety Whistleblower Protection Act

July 26, 1988

Introduction

Mr. Chairman and members of the Subcommittee, my name is Marshall J. Breger. I am Chairman of the Administrative Conference of the United States. Eugene R. Fidell, who is also on the panel this morning, is a lawyer in private practice in Washington and served as a Conference consultant in our study of federal protection of private sector health and safety whistleblowers.

It is a particular delight to be with you today to testify on S. 2095 because the bill is the embodiment of a 1987 Conference recommendation that Congress enact omnibus legislation for the handling and resolution of whistleblower complaints. Indeed, we were gratified that, in introducing the legislation last February, you noted in the Congressional Record both Mr. Fidell's report and subsequent Conference Recommendation 87-2, *Federal Protection of Private Sector Health and Safety Whistleblowers*. (See 134 Cong. Rec. S. 1447 (Feb. 23, 1988), citing 1 C.F.R. 305.87-2 (1988))

Need for Legislation

A principal thrust of S. 2095 is to centralize the administration and enforcement of whistleblower protection within the Department of Labor and create uniform standards and administrative procedures for handling whistleblower complaints. The Conference strongly endorses these objectives.

As explained in Mr. Fidell's report, there are over a dozen whistleblower statutes now on the books with differing provisions for investigation, adjudication, definitions of protected conduct, remedies, statutes of limitations, and judicial review. A nuclear power plant worker seeking protection under the Energy Reorganization Act, for example, has 30 days in which to file a complaint. Employees complaining about unsafe mine conditions have 60 days while employees filing complaints under the Migrant Seasonal and Agricultural Worker Protection Act have 180 days. Complaints under the Clean Air Act or the Energy

Reorganization Act are adjudicated by the Department of Labor but migrant workers must go to Federal District Court. In like fashion, current definitions of protected conduct differ according to statute. Protected activity may include disclosure of information only to federal agencies or, more generally, to a union or employer, or even to the public. Protected conduct may or may not include refusals to work. In some cases where a designated agency declines to proceed with a complaint, the complaining employee has no further administrative or judicial avenue for review. Complaints filed under either the Occupational Safety and Health Act or the Asbestos Hazard Emergency Response Act are examples.

This lack of uniformity threatens to undermine the credibility of this area of the law. Absent some showing that would justify differences from one employment setting to another -- and Mr. Fidell was unable to find any -- centralization of whistleblower investigation and adjudication should be in a single place.

The underlying purpose behind all whistleblower statutes is to ensure the health and safety of workers and the general public. That does not vary according to industry. The Conference has concluded that the existing lack of uniformity does not appear to be reasoned. Most likely, it reflects the incremental enactment of the various statutes over a period of years. There is little reason to apply different procedures -- or even different standards -- to workers in different industries. That is why S. 2095 -- which is a single, omnibus statute, unifying the provisions of existing law and extending these uniform provisions to all protected workers -- is the preferred approach.

Coverage

As part of its recommendation, the Conference urged Congress to review the categories of workers to which it is appropriate to extend whistleblower protection. We noted that, where Congress has judged it necessary to regulate an industry so as to ensure the safety of its workplace, products, services or the environment, Congress should consider whether it is appropriate to strengthen the enforcement scheme by providing whistleblower protection for the industry's employees who report statutory violation.

S. 2095 extends whistleblower protection to all private sector employees who report violations of Federal law that create a danger to the health or safety of the employee or the public. However, the Conference has neither the statutory mandate nor the expertise to render an opinion regarding the proper scope of coverage. Accordingly, we offer no judgment on whether there is a need for such protection in all sectors of the economy in which employees might report violations of federal law.

Specific Provisions of the Bill

S. 2095 incorporates virtually all significant elements of Conference Recommendation 87-2 and it is not necesssary to discuss each one. I would simply offer three brief comments on certain aspects of the legislation.

First, as I noted earlier, various federal agencies or courts now investige or adjudicate whistleblower complaints. The Department of Labor investigates and adjudicates complaints under a majority of existing statutes. So centralization of investigative and adjudicative responsibility in the Department of Labor as proposed in S. 2095 represents a logical choice of forum.

Second, the Conference recommended that any statute expressly authorize the Secretary of Labor to employ alternative means of resolving whistleblower disputes, with the consent of the parties. Section 5(j) of the bill incorporates this aspect of the Conference's recommendation.

Finally, I should note that the proposed legislation contains several provisions that were not studied by the Conference -- such as private rights of action, attorney's fees and exemplary damages for successful complaints, and time limits. It also resolves various inconsistencies among existing statutes. The Conference has not developed any views with respect to those matters it did not study nor does it have any formal opinion on how specific inconsistencies should be resolved, except for the time limit in which to file complaints. We support the provision of S. 2095 which provides a uniform statute of limitation of 180 days for the filing of complaints.

The thrust of our recommendation is simply that a uniform approach should be adopted. S. 2095 achieves this goal and thus represents a significant advance in the effort to establish procedural uniformity for handling whistleblower complaints.

Senator Metzenbaum. Thank you very much, Mr. Breger.

Mr. Breger, do you want to explain the process the Administrative Conference went through to adopt this whistleblower recommendation—in other words, were there hearings or other formal proceedings?

Mr. Breger. Certainly. The Conference, as you know, is an independent Federal agency charged with proposing reforms and improvements in administrative law and procedure throughout the United States Government. The Conference consists of about 101 members; slightly more than half are Government members—usually the general counsels of most Government agencies—and we have about 40 public members, public citizens, usually experts in administrative law and procedure, who are members and participate in our deliberate process. The Conference has committees, and we commission studies; we commissioned Mr. Eugene Fidell to do a study on whistleblower procedures. It was assigned to a committee of the Conference. The committee met four or five times—I can give you the exact number—to discuss, debate and refine the suggestions of Mr. Fidell. As part of that process, it held a public hearing. Senator Grassley testified; lawyers for whistleblowers and lawyers for companies testified; individual whistleblowers testified.

Out of this process of discussion and deliberation, the Conference took the study of Mr. Fidell and developed recommendations. These recommendations were then presented to the Council of the Conference, a group of 10 persons appointed by the president; on approval of the Council, then went to the plenary session. This is a discussion and debate of the full body. Again, at the plenary session the matter is debated, refined, amended and, we think, improved. The final product, our Recommendation 87-2, is published in the Federal Register and then in the Code of Federal Regulations.

Senator Metzenbaum. Mr. Breger, one last question. Since your report and recommendations, have you received any flack; have you heard any comments, or negative comments; have you had any criticism, or have you had any commendation, from people in Government or close to Government?

Mr. Breger. I have had the same variety of commendation and flack on this recommendation as we would have on any recommendation of the Conference.

Senator Metzenbaum. Thank you very much. You ducked that one very well, Mr. Breger. I won't press you further.

Mr. Fidell, we are happy to have you with us, sir. It is nice to see you again.

Please proceed.

Mr. Fidell. Thank you, Mr. Chairman.

I appreciate the opportunity to appear this morning. This is a real privilege for a private citizen such as myself to play a role in the legislative process and see something through from, if not its inception, close to its inception, and what I am hoping is close to the end of the process, or at least the beginning of the end of the process.

May I ask that in addition to my prepared statement that a copy of Table 1 to my report to the Administrative Conference be made a part of the record. This is an important document because it demonstrates quite dramatically the total chaos that has resulted from the rather episodic nature of Congress' involvement in the whistleblowing area over the years.

Senator **Metzenbaum**. Without objection, it will be included in the record.

Mr. **Fidell**. In addition, I have previously submitted several copies of the version of my paper that appears in the spring 1988 issue of the Administrative Law Journal, published by students at the Washington College of Law at the American University, and I might ask if that could be incorporated in the record as well.

Senator **Metzenbaum**. Without objection, it will be included.

[The material and table referred to follows:]

Potestas Necessario Iusteque Delegata

The Administrative
Law Journal

FEDERAL PROTECTION OF PRIVATE SECTOR HEALTH AND SAFETY WHISTLEBLOWERS

Eugene R. Fidell

WASHINGTON COLLEGE OF LAW
FOUNDED
1896

The American University

Volume 2 Spring 1988 Number 1

ARTICLES

FEDERAL PROTECTION OF PRIVATE SECTOR HEALTH AND SAFETY WHISTLEBLOWERS

EUGENE R. FIDELL*

TABLE OF CONTENTS

INTRODUCTION 2
I. TAXONOMY AND TERMINOLOGY 5
II. THE COMMON LAW CONTEXT 6
III. THE FEDERAL LEGISLATIVE RESPONSE 7
  A. Public Sector Employees 7
  B. Private Sector Employees 8
  C. "Twilight Zone" Cases 9
  D. Caseload 9
IV. SHORTCOMINGS OF THE CURRENT ARRANGEMENTS 11
  A. Jurisdictional Lacunae 11
  B. Protected Conduct 14
    1. Protected Disclosures 15
    2. Refusals to Work 16
  C. Limitation of Actions 17
  D. Investigative Arrangements 18
  E. Adjudicatory Procedures 22
  F. Remedies 27

---

* Klores, Feldesman & Tucker, Washington, D.C. B.A., Queens College (1965); LL.B., Harvard University (1968).

This Article was originally prepared as a consultant report for the Administrative Conference of the United States. The views expressed are the author's alone and do not necessarily reflect those of the Conference, its committees, or its staff.

The author acknowledges the assistance of Professor Marshall J. Breger, Chairman of the Administrative Conference, and Jeffrey S. Lubbers, Director of Research of the Administrative Conference. The author is also grateful for the research assistance of Michael P. Lagnado, J.D., The George Washington University (1988).

G. Judicial Review 28
H. Interaction with Program Agencies 29
I. Access to Law and Interagency Doctrinal Growth . 31
V. RECOMMENDATIONS 32
CONCLUSION 35

INTRODUCTION

Few areas of federal labor law are currently the subject of such wide public interest as "whistleblowing," a now familiar term for employee dissemination of information critical of or reflecting adversely on an employer, typically for the purpose of correcting or preventing some violation of law or other harm.[1] A recent widely publicized episode involved two engineers employed at Morton Thiokol, Inc., a major National Aeronautics and Space Administration contractor for the ill-fated *Challenger* space shuttle. The engineers alleged that they were retaliated against for whistleblowing in matters affecting safety.

Over a dozen federal laws attempt to protect whistleblowers from retaliation in wide areas of private sector activity where health and safety are at stake.[2] These laws, which protect both public and workplace health and safety interests, however, omit large and potentially important industries such as aviation and pharmaceuticals. In addition, they have created a crazy quilt of investigative, adjudicatory, and review responsibilities, which are summarized at Table 1.[3] Fortunately, congressional interest in protecting other categories of whistleblowing appears to be increasing.[4]

---

[1] *See generally* Comment, *Employment at Will: Just Cause Protection Through Mandatory Arbitration*, 62 WASH. L. REV. 151 (1987) (summarizing wrongful termination litigation and advocating arbitration as best means to resolve employer-employee disagreements); Comment, *Protecting at Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980) (detailing history of employment-at-will doctrine). Note that the term "whistleblower" may refer to those employees who refuse to work because of perceived safety violations, in addition to those employees who make public information reflecting adversely upon an employer.

[2] Other federal laws protect private sector whistleblowers in non-health and -safety contexts. False Claims Amendments Act of 1986, Pub. L. No. 99-562, § 3, 100 Stat. 3153 (to be codified at 31 U.S.C. § 3732) (amending 31 U.S.C. § 3729 (1982)). In addition, numerous statutes prohibit retaliation against persons who complain of discrimination. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1982); Age Discrimination in Employment Act, 29 U.S.C. § 623(d) (1982). Because they do not relate to health and safety programs, these statutes are beyond the scope of this article. Programs applicable to federal employees are also beyond the scope of this article, although they are noted below and the applicable legislation is identified in Table 2, *infra* p. 38.

[3] *See infra* p. 37 (Table 1).

While a body of literature has grown up concerning whistleblowing, the statutes referred to in this Article are only now being recognized as part of a larger whole. Until now, with a few notable exceptions,[5] little effort has been made to render a rational account of congressional activity in this area. Additionally, those involved in litigation under one of the statutes have tended not to be involved in litigation under the others. Federal whistleblowing protection appears to be more an appendage to the underlying substantive regulatory program than a focus for legal analysis in its own right or a new subspecialty within the field of labor law. This Article suggests a different perspective, namely that the varieties of legislative and administrative experience under federal health and safety whistleblower protection provisions, taken as a whole, represent a "sea change" in labor law that merits study and legislative attention in its own right.

As Table 1 demonstrates, the Secretary of Labor assigned investigative responsibility to the Wage and Hour Division under eight of the federal whistleblowing statutes, to the Occupational Safety and Health Administration (OSHA) under two others, and to the Mine Safety and Health Administration (MSHA) under still another. Some agencies, including the Department of the Interior (DOI), have both investigative and adjudicatory responsibilities, while others, including the Department of Defense (DOD) and the independent Mine Safety and Health Review Commission (MSHRC), have only adjudicatory roles. With the exception of the relationship between the Wage and Hour Division and the Nuclear Regulatory Commission (NRC), there is little active coordination among the agencies concerned.

Some of the statutes create elaborate hearing procedures; others are silent. They differ widely on matters as critical as the definition of "protected conduct," the statute of limitations, remedies, and the machinery for adjudication and judicial review. Statutes of limitations, for example, range from 30 days to six months.[6] Where employees allege violations of OSHA's own regulations, OSHA investigates, and adjudication is provided by the district courts. Where violations of the Surface Transportation Assistance Act of 1982 (STAA)[7] are in issue, however, OSHA investigates, but administrative law judges (ALJ's) at the Department of Labor adjudicate. The Mine Safety and Health Review Commission, an independent agency, decides whistleblowing cases; the Occupational Safety and Health Review Commission — another independent agency — does not. Some statutes cover safety-based refusals to work and employee dissemination of information damaging to the employer. Some contemplate the award of punitive damages, while some authorize temporary reinstatement while the merits of the case are being adjudicated.[8] Under most statutes, employees may obtain judicial review of agency decisions. This is not so, however, in the case of violations of section 11(c) of the Occupational Safety and Health Act[9] (OSH Act) or section 211 of the Asbestos Hazard Emergency Response Act (AHERA).[10] Under these provisions employees must depend upon the willingness of the Labor Department to prosecute causes on their behalf.

---

[4] *See* S. 2516, 99th Cong., 2d Sess. (1986) (prohibiting reprisals against officers and employees of government contractors for disclosing information to federal agencies).

[5] Two excellent works that supply a comprehensive overview of federal protection of private sector whistleblowers are L. LARSON & P. BOROWSKI, UNJUST DISMISSAL (1986); S. KOHN, PROTECTING ENVIRONMENTAL AND NUCLEAR WHISTLEBLOWERS: A LITIGATION MANUAL (Government Accountability Project 1985).

[6] *See* sources cited *infra* p. 37 (Table 1).

These discrepancies reflect vagaries of the legislative process — legislation has addressed various industries on an incremental or piecemeal basis over time — and a number of the discrepancies are difficult to justify according to neutral principles of public administration. On some issues, conscious substantive legislative choice and the political process are reflected in the current institutional arrangements for the protection of private sector health and safety whistleblowers. On the other hand, the institutional "hodge-podge" described in this Article transcends mere untidiness or asymmetry. At a certain point, divergent approaches can overwhelm the law by eroding public confidence in the fundamental coherence of the governmental process. That point has unquestionably been reached in congressional efforts to protect those who suffer employee retaliation for calling attention to health and safety violations.

---

[7] 49 U.S.C. § 2305 (1982 & Supp. III 1985). The regulations for this Act are found at 29 C.F.R. § 1978 (1986).

[8] *See* Brock v. Roadway Express Inc., 107 S. Ct. 1740 (1987) (holding that temporary reinstatement of complainant prior to full evidentiary hearing does not violate employer's due process rights so long as preliminary procedures are available and full post-reinstatement hearing is expeditiously held). MSHRC regulations comply with this standard. *See* 29 C.F.R. § 2700 (1986) (providing preliminary procedures and full post-reinstatement hearing for miners alleging wrongful discharge under Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801-962 (1982)).

[9] *See* 29 U.S.C. § 660(c) (1982) (providing protection for employees who have instituted or caused to be instituted a complaint against their employers for violations of OSHA regulations).

[10] Asbestos Hazard Emergency Response Act of 1986, Pub. L. No. 99-519, § 211, 100 Stat. 2970, 2987 (to be codified at 15 U.S.C. § 2641).

This Article urges: (1) the enactment of omnibus whistleblower legislation that is uniformly applicable to all activities subject to health and safety regulation by the federal government in order to encourage private actions in support of those federal programs and to ensure fairness, uniformity, and rationality in the adjudicatory and remedial processes; and (2) specific actions to be taken by the Secretary of Labor to improve the administration of the current diversity of private sector whistleblower protection programs.[11]

I. Taxonomy and Terminology

Although much of the business of ensuring that laws are observed has become the responsibility of the government, rather than of private citizens, the Supreme Court has rejected the notion that private citizens have no role to play.[12] Whistleblower protection provisions are among the tools available to government for the achievement of public objectives. Some of these tools are used directly by the government itself, while others are used by private individuals. Imprisonment, fines, penalties, and forfeitures are, for example, familiar sanctions used by government as direct disincentives to violations of the law.[13] Rewards[14] or *qui tam* provisions might, by contrast, be thought of as indirect incentives to obey the law because they encourage private interests to assist in the achievement of public ends. In some circumstances, the law may create an indirect negative incentive to encourage private citizens to assist in suppressing crime. The Tariff Act, for example, provides that refusing to assist a Customs officer is a misdemeanor.[15] Federal whistleblowing anti-retaliation provisions remove disincentives for private assistance in achieving public ends. Such provisions hold harm-less those employees whose information must reach the government in order to help achieve public goals.[16]

---

[11] For earlier recommendations for omnibus legislation, see Abbot, *Remedies for Employees Discharged for Reporting an Employer's Violation of Federal Law*, 42 WASH. & LEE L. REV. 1383, 1400 (1985); Jenkins, *Federal Legislative Exceptions to the At-Will Doctrine: Proposed Statutory Protection for Discharges Violative of Public Policy*, 47 ALB. L. REV. 466, 513-24 (1983).

[12] *See* United States v. New York Tel. Co., 434 U.S. 159, 175 n.24 (1977).

[13] Congress could, for example, criminalize acts that interfere with or discourage whistleblowing in areas under federal regulation. Although the literal terms of the Ku Klux Klan Act, 18 U.S.C. § 241 (1982), might cover such misconduct, the Act has been accorded a narrow interpretation, and there is no evidence of it having been used in this fashion.

[14] 18 U.S.C. § 3059 (1982).

[15] *See* 19 U.S.C. § 507 (1982) (providing that customs officer, after making known his identity, may demand and must receive assistance of citizens in performance of his duties); *see also* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 3152, 100 Stat. 3207 (to be codified at 18 U.S.C. § 981) (providing immunity from civil prosecution for persons who render help at request of Customs officer).

There are certain terminological pitfalls in the whistleblowing area. The phrase "employee protection" is, for example, occasionally used to describe whistleblowing anti-retaliation measures.[17] This term, however, has been used in contexts other than whistleblowing. Another recent enactment[18] uses the vague and essentially meaningless term "public protection."

The terms "discrimination" and "affirmative action" respectively describe protected whistleblowing and the fashioning of remedies. Obviously, these terms have particular meanings in society; their use in this context can inappropriately imply a legal or doctrinal kinship with the race relations area, thereby bringing into play very different concerns and values from those that underly public policy in the whistleblowing area.

II. THE COMMON LAW CONTEXT

The background against which the federal legislation addressed in this Article arose may be briefly sketched.[19] At common law (American, incidentally, rather than English), the rule evolved that an employee could be dismissed at the will of the employer unless his contract provided otherwise.[20] This doctrine is said to have originated in a treatise published a little more than a century ago,[21] and was embraced promptly and uncritically. Eventually, however, some courts began to carve exceptions from the rule. Doctrines have arisen in a number of jurisdictions which hold that there is a "public policy exception" to the employment-at-will rule. In summary, such exceptions hold that an employer cannot discharge an employee for conduct that advances a recognized public policy. The law on this point is essentially state law,[22] and the extent to which it applies to any particular set of facts is likely to vary dramatically from one jurisdiction to another.

---

[16] Another disincentive to removal would be to debar government contractors who retaliate against whistleblowers. This was proposed in response to the case of the Morton Thiokol engineers referred to above, H.R.J. Res. 634, 99th Cong., 2d Sess., 132 CONG. REC. 2758 (1986), but the matter died in committee. One of the engineers has sued the company and also asserted a FTCA claim, 28 U.S.C. § 1346(b) (1982), against NASA. Boisjoly v. Morton Thiokol, No. 87-194 (D.D.C. filed Jan. 28, 1987), *noted in* N.Y. Times, Jan. 29, 1987, at A16. col. 1.

[17] For example, 29 C.F.R. §§ 24.1-24.9 (1987) implements various federal "employee protection" provisions for which Secretary of Labor has been given responsibility. *E.g.*, Safe Drinking Water Act, 42 U.S.C. § 300(j)-9(i) (1982); Federal Water Pollution Control Act, 33 U.S.C. § 1367 (1982); Toxic Substances Control Act, 42 U.S.C. § 2622 (1982); Energy Reorganization Act of 1974, 42 U.S.C. § 5851 (1982).

[18] Asbestos Hazard Emergency Response Act of 1986, Pub. L. No. 99-519, § 211, 100 Stat. 2970, 2987 (to be codified at 15 U.S.C. § 2641).

[19] The growth of interest in the whistleblowing area is evidenced by the fact that scholarly writers now no longer feel a need to set out the history of the area. Jenkins, *supra* note 11, at 467 & n.11 (1983); Comment, *Retaliatory Discharge: A Public Policy Exception to the Employment At-Will Doctrine in Maine*, 38 ME. L. REV. 67, 70 n.6 (1986).

[20] L. LARSON & P. BOROWSKI, *supra* note 5, § 2.04.

[21] *See* Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 126-27 (1976).

III. THE FEDERAL LEGISLATIVE RESPONSE

In addition to judicial recognition of a public policy exception to the employment-at-will doctrine, Congress and a number of state legislatures have enacted specific provisions ensuring protection against retaliation for employees who assert various rights. The federal legislation includes a variety of statutes, only some of which deal with public health and safety programs.[23] This Article is confined to the measures protecting health and safety whistleblowers, although a broader study may be desirable at a later date to explore the need for rationalizing the entire federal legislative scheme.

A. Public Sector Employees

Table 2[24] lists the various federal statutes that seek to protect from retaliation those public employees who engage in whistleblowing. These statutes are beyond the scope of this Article, but a few words may still be in order. The key statute is the Civil Service Reform Act of 1978 (CSRA),[25] which created broad protection for disclosures by civilian federal employees. Health and safety disclosures, however, form only a small part of the field of protected conduct under the CSRA. Most CSRA whistleblower cases involve allegations of waste, fraud, and abuse. The most recent addition to the list of public sector anti-retaliation laws is the Department of Defense Authorization Act of 1987,[26] which extends protection to defense contractor employees for disclosures to members of Congress, DOD, or the Justice Department "relating to a substantial violation of law related to a defense contract."[27] This measure is a modification of an earlier proposal that would have extended protection expressly to disclosures relating to a "substantial and specific danger to public health and safety."[28] In addition, the earlier version protected military personnel as well as contractor employees from reprisals.[29]

---

[22] L. LARSON & P. BOROWSKI, *supra* note 5, § 11.04 (summarizing federal common law developments in area of wrongful discharge).

[23] The best single catalogue of the federal statute appears in L. LARSON & P. BOROWSKI, *supra* note 5, § 11.02-.03. Thoughtful articles have been written by William R. Jenkins, *supra* note 11, and Kohn & Kohn, *An Overview of Federal and State Whistleblower Protections*, 4 ANTIOCH L.J. 99 (1986). Federal regulations also require state OSHA plans to include employee protection provisions. 29 C.F.R. § 1902.4(c)(2)(v) (1986).

[24] *See infra* p. 38 (Table 2).

[25] 5 U.S.C. § 2101 (1982).

[26] Pub. L. No. 99-661, § 942(a)(1), 100 Stat. 3816 (whistleblowing provision to be codified at 10 U.S.C. § 2409).

B. Private Sector Employees

The range of federal statutes protecting private sector employees who "blow the whistle" on health and safety problems is considerable.[30] Combined, these statutes protect a large portion of the American work force, and fall into several broad categories. Some are industry-based, such as those affecting mining, the nuclear industry, or particular transportation modalities. Some address sweeping environmental concerns, including those for which the Environmental Protection Agency (EPA) is the program agency. And some cut across the broad spectrum of of this country's industrial activities, including the OSH Act,[31] the National Labor Relations Act (NLRA),[32] and the Labor Management Relations Act (LMRA).[33] The same conduct may violate more than one statute, thus involving multiple decisional tracks.[34]

The effectiveness of these arrangements is open to question. As two perceptive students of the field have written, "[t]he record is particularly grim in industry; not one of the industrial whistleblowers we studied survived on the job."[35] "With few exceptions, they are driven out of not just their jobs, but their professions, too."[36]

---

[27] *Id.*

[28] The disclosures intended to be protected were the same as those protected under the Civil Service Reform Act, 5 U.S.C. § 2302(b)(9)(B) (1982).

[29] Proposed section 921 would have extended whistleblower protection to military personnel by restoring the victim's position and punishing the retaliator. H.R. 4428, 99th Cong., 2d Sess. 266 (1986).

[30] *See* sources cited *infra* p. 37 (Table 1).

[31] 29 U.S.C. § 660(c) (1982).

[32] 29 U.S.C. §§ 151-169 (1982 & Supp. III 1985).

[33] Section 502 of the Labor Managment Relations Act, 29 U.S.C. § 143 (1982), stands on a somewhat different footing from the other statutes. It creates no remedy for retaliation, but rather prevents an employer from invoking a collective bargaining agreement's no-strike clause where one or more employees quit work "in good faith because of abnormally dangerous conditions" to be considered a strike." *Id.*

[34] *See* Murphy v. Consolidation Coal Co., No. 83-ERA-4 (Dep't Lab. Jan. 17, 1985) (approving settlement under TSCA); Murphy v. Consolidation Coal Co., No. CH3-1-D (Dep't Int. Jan. 14, 1985) (dismissing Surface Mining Control and Reclamation Act (SMCRA) case upon settlement).

[35] Glazer & Glazer, *The Whistle-Blowers' Plight*, N.Y. Times, Aug. 13, 1986, at A23, col. 1.

C. "Twilight Zone" Cases

In a number of instances, it may be difficult to characterize the class protected by a whistleblower statute as "public" or "private." For example, the 1984 Defense Department authorization extended whistleblower protection, including coverage of health and safety disclosures, to employees of nonappropriated fund activities. Section 211(a) of the Asbestos Hazard Emergency Response Act of 1986[37] protects all persons from discrimination, specifically including employees of state and local educational agencies. State employees have found protection under the Safe Drinking Water Act (SDWA),[38] and at least one case involving a federal employee — that of EPA employee Hugh Kaufman — has been filed with the Department of Labor under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA).[39] In addition, government contractor employees have been held to be protected under several of the whistleblower statutes.[40]

D. Caseload

Caseload figures for private sector health and safety whistleblowing cases in fiscal year 1985 reveal that by far the largest single category of complaints is under section 11(c) of the OSH Act.[41] These cases, however, do not involve agency hearings; if OSHA finds the case meritorious, it brings a civil action on behalf of the complaining employee. The only intra-agency remedy a complainant has is to seek review within OSHA of an initial decision not to pursue the case.[42] No private right of action exists, and very few section 11(c) cases are pursued by the Labor Department.[43]

---

[36] *See*, Kleinfield, *The Whistle Blowers' Morning After*, N.Y. Times, Nov. 9, 1986, at C1, col. 2 (noting conclusion of Glazer research, *supra* note 35). "But that doesn't mean they always are reduced to dire poverty and icy isolation. Often they are reincarnated in some new position." *Id.*

[37] Pub. L. No. 99-519, § 211, 100 Stat. 2970, 2987 (1986) (to be codified at 15 U.S.C. § 2641).

[38] 42 U.S.C. §§ 300f-j(10) (1982); *see* Bauch v. Landers, No. 79-SDWA-1 (OALJ); Chase v. Buncombe County Dep't of Community Improvement, No. 85-SWD-4 (Solid Waste Disposal Act; county landfill employee). In contrast, a state employee was held not protected under the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1293 (1982), on the theory that the state is not a person within the meaning of § 703 of that Act. Leber v. Pennsylvania Dep't of Envtl. Resources, 780 F.2d 372, 378 (3d Cir. 1986), *cert. denied*, 106 S. Ct. 3294 (1986).

[39] 42 U.S.C. § 9601 (1982).

[40] *E.g.*, McAllen v. EPA, No. 96-WPC-1 (OALJ Nov. 28, 1986); Conley v. McClellan Air Force Base, No. 84-WPC-1 (OALJ Sept. 12, 1984); McGough v. United States Navy, No. 86-ERA-18 (OALJ Aug. 19, 1986), slip op. at 3 n.3 (dictum). *But see* Wensil v. B.F. Shaw Co., No. 86-ERA-15 (OALJ July 8, 1986) (holding DOE contractor's employees, who were working at plant not licensed by NRC, not protected despite plain meaning of statute); Peterson, *2d Worker Dismissed by Contractor After Alleging Drug Use at Atom Plant*, Washington Post, Jan. 8, 1987, at A17, col. 1 (noting pendency of *Wensil* jurisdictional issue regarding Savannah River DOE plant).

[41] 29 U.S.C. § 660(c) (1982).

The section 11(c) complaint caseload appears to have been fairly stable over the last several years.[44] For example, in fiscal year 1978, OSHA received 3,000 employee complaints.[45] The corresponding numbers for fiscal years 1983 and 1984 were 2,522 and 2,813, respectively.[46]

The second-largest group of cases involves the Surface Transportation Assistance Act,[47] under which OSHA received 354 complaints during fiscal year 1984.[48] The number of complaints declined to 248 in fiscal year 1985.[49] In the first half of 1984, only eight cases were found to have merit, but in the second half of 1984 25 cases were found to have merit.[50] In 1985 58 merit findings were issued.[51] In fiscal year 1985, the Labor Department's Office of Administrative Law Judges (OALJ) docketed 20 STAA cases following OSHA investigation, and conducted six administrative hearings.

Third in frequency are retaliation complaints under the Federal Mine Safety and Health Act.[52] MSHA investigated 205 complaints of safety- or health-related discrimination that were filed during fiscal year 1985.[53] The Labor Department's Office of Administrative Law Judges adjudicates cases under a broad range of statutory programs, most of which have nothing to do with whistleblowing. The Office is, however, also responsible for a substantial part of the overall whistleblower caseload. The OALJ received 77 such cases during fiscal year 1985 under the various whistleblowing statutes it administers (including the 20 STAA cases referred to above). Of these, the vast majority were nuclear cases brought under the Energy Reorganization Act (ERA).[54] The OALJ received 264 whistleblowing cases between 1980 and late 1986.[55] However, there have been very few discrimination complaints under the Surface Mining Control and Reclamation Act (SMCRA).[56] The number of whistleblower complaints received by the Department of Labor was not available at the time of publication of this Article, but it appears that in fiscal year 1985 the Wage and Hour Division conducted approximately 50 investigations under the statutes for which it is responsible, of which about one-half were found to be meritorious.

---

[42] *See* George v. Aztec Rental Center, 763 F.2d 184 (5th Cir. 1985) (holding no private right of action for private employer's retaliatory discharge of employee who files OSHA complaint); Holmes v. Schneider Power Corp., 628 F. Supp. 937 (W.D. Pa. 1986) (holding no private right of action for employee); *see also* L. Larson & P. Borowski, *supra* note 5, § 11.03[20]. This doctrine applies only to conventional whistleblowing actions; in refusal-to-work situations, the employee can seek mandamus requiring the Secretary to enforce the statute. 29 U.S.C. § 662(d) (1982).

[43] *See* Note, *The Employment-at Will Doctrine: Providing a Public Policy Exception to Improve Worker Safety*, 16 U. Mich. J. L. Reform 435, 439-40 (1983) (noting deficiencies in DOL personnel and resources); B. Mintz, OSHA History, Law and Policy 342 (1984) (lamenting 429 "meritorious" cases languishing in Solicitor's Office at DOL).

[44] *But see* 73 Dep't Lab Ann. Rep. FY85 121 (1986) (refering to "substantial increase" in section 11(c) caseload, among others).

[45] Solomon & Garcia, *Protecting the Corporate WhistleBlower Under Federal Anti-Retaliation Statutes*, 5 J. Corp. L. 275, 283 (1980).

[46] 1984 OSHA Ann. Rep. 56.

[47] 49 U.S.C. § 2305 (1982).

[48] 48. 1984 OSHA Ann. Rep. 56.

[49] *Labor Dept's Enforcement of "Whistleblower" Law Found Weak*, Convoy Dispatch, Feb. 1986, No. 59, at 3, col. 3.

[50] *Id.*

[51] *Id.*

[52] 30 U.S.C. § 801 (1982).

Statistics concerning the incidence of whistleblowing cases brought before the NLRB were also unavailable, although case summaries furnished by the Board's Office of General Counsel indicate that health and safety issues are not uncommon in Board proceedings.[57] For comparative purposes, during fiscal year 1985, the Office of Special Counsel of the Merit Systems Protection Board received 135 whistleblowing disclosures from federal employees.[58]

IV. SHORTCOMINGS OF THE CURRENT ARRANGEMENTS

A. Jurisdictional Lacunae

The most obvious shortcoming of the current federal legislation protecting health and safety whistleblowers is the omission of coverage for major sectors of the economy where health and safety are unquestionably at stake. For example, Congress has yet to extend whistleblowing protection to aviation, aerospace, vessel construction and operation, food and drugs, medical devices, and consumer products generally. Also, while the major environmental laws administered by EPA include whistleblower provisions, one — the Noise Control Act of 1972[59] — does not. Even where the industry itself is covered, the statute may be written to exclude persons whose jobs have safety implications.[60]

---

[53] In fiscal years 1985 and 1986, the full MSHRC decided 11 cases involving safety complaints or refusals to work. Three cases involved both kinds of discrimination, five involved only safety or health complaints, and three involved only a refusal to work. 73 DEP'T LAB. ANN. REP. FY85 63 (1986); *see* Letter from L. Joseph Ferrara, General Counsel, MSHRC, to Eugene R. Fidell (Oct. 31, 1986) (discussing MSHRC litigation).

[54] 42 U.S.C. § 5851 (1982).

[55] *Private Sector Whistleblower Protection Statutes, 1986: Public Hearings Before the Administrative Conference of the United States* 45-46 [hereinafter *ACUS Whistleblower Hearings Transcript*] (testimony of Nahum Litt, Chief Judge, OALJ).

[56] 30 U.S.C. § 1293 (1982).

[57] Letter from James Y. Callear, Freedom of Information Officer, NLRB, to Eugene R. Fidell (Sept. 4, 1986).

[58] OFFICE OF SPECIAL COUNSEL OF MERIT SYSTEMS PROTECTION BD. ANN. REP. FY85 15 (1985).

Government contractors constitute a major omission to the extent that their activities are not covered by any of the subject-matter-specific anti-retaliation statutes. For example, in 1974 the Department of Labor and the Atomic Energy Commission acknowledged that the whistleblower provisions of the OSH Act are inapplicable to the working conditions of Atomic Energy Commission (AEC) contractor employees who work in facilities which are owned or leased by the government, but operated by the contractor, so long as the AEC prescribes and enforces radiological and nonradiological occupational safety and health standards.[61] This kind of gap has been addressed in a variety of ways, including internal agency regulations or contractual provisions.[62]

Congress has also begun to recognize the need for coverage of government contractors in general. For example, in the aftermath of the *Challenger* disaster, Representative Markey observed: "If the Morton Thiokol engineers were Federal employees, they would have recourse through the Civil Service Reform Act and the Office of Special Counsel. But as employees of a Government contractor, they have no protection."[63]

---

[59] 42 U.S.C. § 4901 (1982 & Supp. III 1985).

[60] *See* Paul v. Federal Mine Safety and Health Review Comm'n, 812 F.2d 717 (D.C. Cir. 1987), *cert. denied*, 107 S. Ct. 3269 (1987) (holding mining engineer not miner). Another controversial issue involves the application of environmental whistleblower provisions to prison inmates. *See* Kurtz, *Inmates as 'Federal Employees': Whistleblower Law Is Used to Contest Dismissal from Prison Job*, Washington Post, Feb. 12, 1987, at A25, col. 3 (noting OALJ ruling that federal inmate is protected by Clean Air Act anti-retaliation section).

[61] Department of Energy Order No. 5483.1A (June 22, 1983). This DOE order was an interpretation of section 4(b)(1) of the OSH Act, 29 U.S.C. § 653(b)(1) (1982), which reads as follows:

> Nothing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies acting under section 2021 of title 42, exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

[62] *See In re* Mestres (Dep't of Energy Spec. App. Bd. Dec. 27, 1984), *noted in* Washington Post, Jan. 29, 1985, at A17, col. 1. Protection may also be afforded under contractual provisions. *ACUS Whistleblower Hearings Transcript*, *supra* note 55, at 107 (testimony of James E. Jensen).

Protection of whistleblowers such as the Morton Thiokol engineers may well raise difficult drafting problems, since it appears that the engineers' expressions of concern were not couched in terms of violations of federal regulations, but rather spoke to the degradation of safety standards peculiar to the shuttle effort. The protection of safety concerns voiced within a company is, not surprisingly, a matter of considerable controversy. Congress should, in framing generic whistleblower protection legislation, carefully consider how such legislation would have affected the *Challenger* case.

Congress has not yet passed general whistleblower protection legislation for employees of government contractors, although it has done so for Department of Defense contractors in the 1987 Department of Defense Authorization Act.[64] Prior to passage of that legislation, an employee of a Defense Department contractor who alleged retaliatory discharge could have sued under the False Claims Act,[65] although the gravamen of such a case is fraud on the government rather than harm to the employee. Although not successful thus far, generic protection for contractor employees was introduced in the 99th Congress[66] and will be reintroduced in some form in the 100th Congress.

Of course, not all health and safety programs involve concerns of the same gravity and magnitude. To take an obvious example, the potential health and safety implications of many violations of NRC regulations could be of a different order of magnitude from an isolated violation of trucking safety regulations. Comparing safety programs requires consideration not only of the scope of the hazard, but also the probability of its occurrence. Perhaps a standard could be developed under which one could argue that different measures of employee protection are appropriate in various employment settings. On the other hand, one would think that anything that was sufficiently charged with a public interest to warrant federal regulation should also provide for the protection of whistleblowers simply as an aid to enforcement and ensuring voluntary employer compliance with the underlying safety and health requirements.

---

[63] 132 CONG. REC. H2710 (daily ed. May 14, 1986) (statement of Rep. Markey).

[64] *See* National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 942, 100 Stat. 3816 (to be codified at 10 U.S.C. § 2409) (providing that contractor employee may not be discriminated against as reprisal for disclosing substantial violations of statutory law to member of Congress or Departments of Defense or Justice).

[65] 31 U.S.C § 3729 (1982), *amended by* False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (to be codified at 31 U.S.C. § 3732); *see also* Cushman, *Experts See Risk in Troop Carrier: Army's Bradley Vehicle Could Sink in Combat They Say*, N.Y. Times, Sept. 21, 1986, at 1, col. 1 (reporting claim of discharge in retaliation for refusing to sign report that omitted details on flaws in new Army troop carrier).

[66] Federal Government Contractors Personnel Protection Act of 1986, S. 2516, 99th Cong., 2d Sess (1986). S. 2516 would have created a federal cause of action, enforceable by the individual in district court, for any reprisal against an officer or employee of a government contractor for disclosing to an agency information that the individual "reasonably believes indicates . . . a substantial and specific danger to public health or safety." *Id.* The agency head would also have been empowered to impose civil penalties of up to $500,000 per reprisal, subject to an on-the-record APA hearing, 5 U.S.C. § 556 (1982), with judicial review in district court.

One thoughtful reviewer of this Article cautioned that expansion of whistleblower protections to persons in highly sensitive positions might make it too difficult to remove an incompetent or malicious employee.[67] Where the superior can anticipate that his own integrity may be put in issue in the adjudicatory process, there may be a chilling effect on his or her willingness to take needed disciplinary action. The net result would be contrary to the public interest in health and safety. This factor is difficult to assess in empirical terms, but there does seem to be a satisfactory response to it: the adjudicatory process must be reasonably prompt and reliable, and so managed as to offer no reason for malcontents or marginal performers to see it as an insurance policy against proper discipline. Agency decisionmakers should be alert to the detrimental effect on health and safety if managers and supervisors form the opinion that turning a blind eye to poor work is preferable to the inconvenience of an investigation and possible hearing. The process should be as free of wasted time and effort as possible so that supervisors are not deterred from performing their jobs.

Nonetheless, as in any disputatious setting, there will always be some who are so put off at the prospect of a government investigation that they may "put up" with a poor performer longer than they should. There is, however, nothing peculiar to this situation; how long would an unsafe employee be retained even though firing him or her would trigger some other kind of discrimination claim?

B. Protected Conduct

The health and safety whistleblowing statutes basically protect two kinds of conduct: (1) disclosures; and (2) in a few instances, refusals to work. Unfortunately, Congress has not acted uniformly in either category.

---

[67] Letter from John F. Sherman III, Assistant General Counsel, New England Power Service Co., to Eugene R. Fidell (Dec. 15, 1986).

1. Protected Disclosures

Congress has used a wide range of terms to describe the disclosures it wants to protect. It is, however, difficult to understand why a uniform set of concepts could not be substituted.

To identify a few of the variations, there are provisions that apply to any disclosure (AHERA),[68] to disclosures to the media (OSH Act),[69] to disclosures to the agency or agencies responsible for administering the underlying regulatory program (e.g., ERA),[70] and to disclosures to a union (FMSH Act,[71] OSH Act) or employer (FMSH Act, OSH Act, SMCRA[72]). The circuits are split on whether the ERA protects "internal" complaints to an employer.[73] The underlying validity of employee safety concerns under the ERA and environmental statutes has been held to be outside of the Labor Department's jurisdiction; thus, the disclosure need only be made in good faith.[74]

Retaliation against concerted activity in response to safety concerns has been held to be an unfair labor practice by the National Labor Relations Board, but the Board has recently emphasized that it "was not intended to be a forum in which to rectify all the injustices of the workplace."[75] Given the requirement for concerted activity, and the Board's emphasis on the fact that the employee in *Meyers Industries*[76] might have an action under state law or (had it been in effect at the time) under the STAA, it seems improbable that the NLRA[77] will prove to be of substantial benefit to whistleblowers who act alone —

---

[68] 15 U.S.C. § 2641 (1982).

[69] 29 U.S.C. § 651 (1982); *see* Wedderspoon v. Milligan 80-WPCA-1, at 10-11 (OALJ July 11, 1980) (holding disclosures to news media also protected under WPCA). *See generally* Kohn & Carpenter, *Nuclear Whistleblower Protection and the Scope of Protected Activity Under Section 210 of the Energy Reorganization Act*, 4 ANTIOCH L.J. 73, 75 (1986).

[70] 42 U.S.C. § 5851 (1982).

[71] 30 U.S.C. § 815 (1982).

[72] 30 U.S.C. § 1293 (1982).

[73] *Compare* Brown and Root v. Donovan, 747 F.2d 1029, 1032 (5th Cir. 1984) (holding internal whistleblowing is not protected unless employee has contact with government) *with* Kansas Gas & Elec. Co. v. Brock, 180 F.2d 1505 (10th Cir. 1985), *cert. denied*, 106 S. Ct. 3311 (1986) (holding whistleblower protection extends to internal complaint) *and* Mackowiak v. University Nuclear Systems, 735 F.2d 1159 (9th Cir. 1984) (holding internal complaints protected) *and* Wheeler v. Caterpillar Tractor Co., 108 Ill. 2d 502, 485 N.E.2d 372 (1985) (holding complaint need not be made to regulatory authority), *cert. denied*, 106 S. Ct. 1641 (1986).

[74] S. KOHN, *supra* note 5, at 28-29.

[75] Meyers Industries, 1986 NLRB Dec. (CCH) ¶ 18,184, 281 NLRB No. 118, at 19 (Sept. 30, 1986), *aff'd sub nom.* Prill v. NLRB, 835 F.2d 1481 (D.C. Cir. 1987).

[76] *Meyers Industries* involved a truck driver who was retaliated against for refusing to work and reporting a safety violation to state authorities. 281 NLRB No. 118.

[77] National Labor Relations Act, 29 U.S.C. §§ 151-169 (1982 & Supp. III 1985).

particularly if their conduct might also be protected under other legislation.[78] Indeed, the current Board has expressly disclaimed an interest in "taking it upon ourselves to assist in the enforcement of other statutes."[79] This narrow perspective appears to be at odds with the philosophy underlying whistleblower provisions, the basic purpose of which is to assist in the achievement of substantive federal health and safety objectives. Because the statute of limitations for unfair labor practice complaints is longer than most of the whistleblowing statutes, contraction of the NLRB's role effectively reduces the protection available to employees. *Meyers Industries* suggests that Congress should not look to the broad coverage of the NLRA as a reason to refrain from enacting generic private sector whistleblower legislation.[80]

2. *Refusals to Work*

Employee refusals to work are protected under the Energy Reorganization Act,[81] the Federal Mine Safety and Health Act,[82] the Federal Railroad Safety Authorization Act,[83] the Labor Management Relations Act,[84] the National Labor Relations Act,[85] and the Surface Transportation Assistance Act.[86] The NLRA protects only "concerted activity" under section 7,[87] rather than individual conduct.[88] Unless the refusal to work is part of a group effort or is an individual effort intended to enlist the support of others, or involves the assertion of a right grounded in a collective bargaining agreement,[89] it will not be protected.[90] Section 502 of the LMRA applies to employees who stop work "in good faith because of abnormally dangerous conditions,"[91] but it is unclear whether the provision protects only those workers actually at risk, or others who join with them. In addition to these statutory provisions, safety-based refusals to work are protected by a regulation[92] issued under the OSH Act, and upheld by the Supreme Court in *Whirlpool Corp. v. Marshall.*[93]

---

[78] The Supreme Court has recognized that "parties may have a choice of federal remedies," Cornell Constr. Co. v. Plumbers and Steamfitters Local Union 100, 421 U.S. 616, 635 n.17 (1975), but one wonders whether dual federal remedies are necessary in the whistleblowing area. If federal whistleblowing legislation were reorganized as recommended herein, there would be less need to be concerned about limitations on the gloss applied to the NLRA, and no need for two federal agencies to address a single issue.

[79] Meyers Industries, 281 NLRB No. 118, at 19.

[80] Indeed, on appeal the District of Columbia Circuit affirmed the NLRB's decision in *Meyers Industries*, holding that the Board's interpretation of "concerted activity" was reasonable. Prill v. NLRB, 835 F.2d 1481, 1485 (D.C. Cir. 1987).

[81] 42 U.S.C. § 5851 (1982). While the statute is silent, the Secretary of Labor has construed the ERA to protect good faith, reasonable refusals to work on the theory that the ERA and FMSHA are *in pari materia*. Pensyl v. Catalitic Inc., No. 83-ERA-2, slip op. at 5 (SOL Jan. 13, 1984).

[82] 30 U.S.C. § 815 (1982).

[83] 45 U.S.C. § 441 (1982).

[84] 29 U.S.C. § 143 (1982).

[85] 29 U.S.C. §§ 151-169 (1982 & Supp. III 1985).

[86] 49 U.S.C. § 2305 (1982).

[87] 29 U.S.C. § 157 (1982).

[88] *See generally* Nothstein, *Employee Refusals to Work*, Labor (Fall 1982).

[89] NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 830 (1984).

The refusal to work provisions typically require that the employee have an actual reasonable belief that he is in danger.[94] For example, the STAA provides:

> No person shall discharge, discipline, or in any manner discriminate against an employee . . . for refusing to operate a vehicle when such operation constitutes a violation of any Federal rules, regulations, standards, or orders applicable to commercial vehicle safety and health, or because of the *employee's reasonable apprehension of serious injury* to himself or the public due to the unsafe condition of such equipment. The unsafe conditions causing the employee's apprehension of injury must be of such nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a bona fide danger of an accident, injury, or serious impairment of health, resulting from the unsafe condition . . . .[95]

C. Limitation of Actions

The range of statutes of limitations applicable to health and safety whistleblowing complaints is considerable and, given the plain kinship among these statutes, intellectually indefensible.[96] Absent some showing that would justify differences from one setting to another — and this author has been unable to discern the basis for such a showing — a single statute should govern.

What should the limitation period be? This is necessarily a matter of legislative judgment and should reflect the fact that employers are unlikely to inform the employee that he or she is being dismissed as a reprisal for whistleblowing. Because of this, the employee may not be aware at the time of discharge that a statutory right has been tolled. If an employee must file more than a "notice of appeal" to trigger the whistleblowing hearing process,[97] a 30-day statute of limitations is unreasonable, even if a notice is required to be posted at the workplace advertising the complaint process. Moreover, an employee may well find it impossible to find counsel who can prepare a complaint in such a short period, particularly since much whistleblower litigation is conducted on a contingent fee basis in the hope of securing an award of attorneys' fees.

---

[90] Meyers Industries, 1986 NLRB Dec. (CCH) ¶ 18,184, 281 NLRB No. 118, at 20 (Sept. 30, 1986), *aff'd sub nom.* Prill v. NLRB, 835 F.2d 1841 (D.C. Cir. 1987).

[91] 29 U.S.C. § 143 (1982).

[92] 29 C.F.R. § 1977.3 (1986).

[93] 445 U.S. 1 (1980). The Court in *Whirlpool* upheld an interpretive regulation allowing an employee to refuse to expose himself to a dangerous condition without being subjected to subsequent discrimination by the employer. *Id.* at 12.

[94] *See* Gateway Coal Co. v. United Mine Workers, 414 U.S. 368, 386 (1974) (requiring subjective good faith and ascertainable, objective evidence supporting conclusion that abnormally dangerous condition for work exists in order to justify work stoppage under section 502 of LMRA). Section 815(c) of FMSHA, 30 U.S.C. § 815(c) (1982), has been held to apply to refusals to work based on reasonable, good faith belief that the safety of another employee will be endangered. Consolidation Coal Co. v. FMSHRC, 795 F.2d 364, 368 (4th Cir. 1986).

[95] 49 U.S.C. § 2305(b) (1982) (emphasis added).

[96] *See* sources cited *infra* p. 37 (Table 1).

A significant number of the whistleblowing cases brought to the DOL's Office of Administrative Law Judges are dismissed for untimeliness. Other cases are dismissed for untimeliness by the investigative agencies. On balance, and considering the potential complexity of these cases, a single statute of limitations of not less than 180 days seems appropriate.

D. *Investigative Arrangements*

As discussed previously, various agencies are responsible for the investigation of whistleblower complaints under the private sector statutes.[98] The Wage and Hour Division has been given responsibility for seven whistleblower statutes under which hearings are conducted by the DOL's Office of Administrative Law Judges, as well as for two whistleblower statutes (FLSA and MSAWPA)[99] under which adjudication is conducted by the district courts. In addition, OSHA is responsible for STAA[100] cases that are eventually heard by the OALJ, as well as violations of OSHA's own regulations, which are heard in the district courts.

The basic issue that emerges from the assignment of investigative functions is whether those functions should be performed by the agency with responsibility for the underlying substantive safety program. On the one hand, if the subject matter is complex or technical, it could be argued that only the program agency would have the technical expertise necessary to evaluate whistleblower cases. On the other hand, there may be concern that the program agency might be less than impartial in whistleblower cases to the extent that a whistleblower's charges may be thought to imply that the program agency was ineffective.[101] Some program agencies are considered to be too sympathetic to the regulated industry; this, as well as lack of resources, may lead to "dispirited" enforcement of safety regulations.[102] In the past, Congress has recognized the possibility that an agency might have such a conflict of interest. An example of this was Congress's breakup of the former Atomic Energy Commission (which had both regulatory and promotional responsibilities) into the NRC and the former Energy Research and Development Administration.[103]

---

[97] *Compare* Richer v. Baldwin Associates, No. 84-ERA-09/10/11/12 (SOL Mar. 12, 1986) (*pro se* complaint; detailed pleading not required) *with ACUS Whistleblower Hearings Transcript*, *supra* note 55, at 100-01 (testimony of Mozart G. Ratner).

[98] *See* sources cited *infra* p. 37 (Table 1).

[99] 29 U.S.C. § 201 (1982); 29 U.S.C. § 1855 (1982). The FLSA is not listed in Table 1 because, although the FLSA child labor provisions have a health and safety component, retaliation cases under those provisions are virtually unheard of.

[100] 49 U.S.C. § 2305 (1982).

The case for adjudication by the program agency because of its substantive expertise in the underlying technical field is unpersuasive. The program agency would always be available to supply expert witnesses on any truly technical issues. This is presumably the case for those complaints that arise under statutes where adjudication is handled by the district courts, which can claim no special expertise. Also, the whistleblowing statutes do not require a determination that the complainant's safety concern is technologically "correct," but rather that it is merely reasonable in the circumstances. Admittedly, even that question imposes on the decisionmaker an obligation to assess the merits of the worker's health or safety concern. The burden on the decisionmaker would seem to be much less onerous, however, than might be the case if the complainant was protected from reprisal only if his or her safety objection was not only reasonable but also correct.

Congress has not yet taken a clear position on the generic issue of agency conflicts, although under seven of the whistleblower statutes (DoD87, FMSHA, Federal Railroad Safety Authorization Act (FRSAA), MSAWPA, NLRA, OSHA, SMCRA) the program agency is also the whistleblowing investigative agency.[104] While the statutes which combine these roles involve technical issues, as seen in the environmental and nuclear areas, certainly there are also technical issues arising under the two mining statutes,[105] under each of which the program agency is also the investigator. To the extent that a statutorily independent Inspector General is assigned investigative responsibility under the Department of Defense Authorization Act of 1987,[106] the danger of institutional conflicts of interest would appear to be minimal under that particular statute.

---

[101] *ACUS Whistleblower Hearings Transcript, supra* note 55, at 40-41, 73.

[102] Letter from Julie Fosbinder, Teamsters for a Democratic Union, to Jeffrey S. Lubbers, Director of Research, ACUS (Dec. 1, 1986).

[103] Energy Reorganization Act of 1974, § 2(c), Pub. L. No. 93-438, 88 Stat. 1233 (1974) (codified at 42 U.S.C. § 5801 (1982)).

[104] Department of Defense Authorization Act of 1987, Pub. L. No. 99-661, § 942, 100 Stat 3942 (to be codified at 10 U.S.C. § 2409); FMSHA, 30 U.S.C. § 815 (1982); FRSAA, 45 U.S.C. § 421 (1982); MSAWPA, 29 U.S.C. § 1855 (1982); NLRA, 29 U.S.C. § 151-169 (1982); OSH Act, 29 U.S.C. § 660 (1982); SMCRA, 30 U.S.C. § 1293 (1982). Under DoD87, investigations are done by the Inspector General, thus providing a measure of independence from the procurement agency. On the other hand, the Inspector General's report simply goes to the Secretary, who naturally has

The public interest would be served by having a single agency responsible for all whistleblowing investigations, since investigation of whistleblowing is itself a specialty. The choice of agency is not crucial, but presumably it should be one that is currently responsible for a substantial share of the government's total caseload of whistleblower complaints. The available data tend to point toward OSHA, although the Wage and Hour Division of the Department of Labor has also amassed valuable experience under the varied statutes for which it has investigative responsibility. The choice is probably best left to the Secretary of Labor. In any event, there is no need to create a new agency or additional staff for this purpose; the non-OSHA caseload data suggest that interagency transfers would suffice to meet any shift in agency responsibilities. If, on the other hand, substantial new categories of employees are brought under whistleblower provisions, some net increase in staff would probably be necessary.

The program agencies should play an active role in support of the investigative agencies, even if they do not themselves have investigative responsibility. In technical cases, the program agencies can (and already do, on occasion) furnish technical advice to the investigative agencies. They can also provide expert witnesses or technical interrogators for hearings. At times, they might wish to appear as *amici* in the whistleblower hearings.[107] And they should receive reports on the outcome of each hearing so that they may take whatever follow-up actions may be appropriate in light of the facts developed in the adjudicatory process. These reports should include the adjudicatory decisions as well as the investigative agency's comments and analysis, where appropriate. The program agencies should take affirmative steps to aid whistleblowers, including the issuance of employee protection regula-

---

ultimate responsibility for procurement.

[105] Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 (1982); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1293 (1982).

[106] Pub. L. No. 99-661, § 942, 100 Stat. 3942 (to be codified at 10 U.S.C. § 2409).

[107] *See* 29 C.F.R. § 18.12 (1986) (*amici* restricted to filing briefs).

tions that could be enforced in the licensing context, where appropriate, such as the NRC has done.[108] Agency regulations could also impose useful notice-posting requirements that would advise employees in advance of their rights under the employee protection statutes.[109] This is particularly appropriate if Congress continues to insist on unrealistically short statutes of limitations.

Concern has been expressed over the short time typically allotted to the investigative agencies for processing employee complaints. Rather than simply eliminating the investigative phase (e.g., permitting the employee to institute an APA[110] hearing without prior agency screening),[111] attention might be given to allowing an APA hearing upon request, if the investigative agency has not completed its investigation within a fixed period.[112] The disadvantage of such an arrangement would be that the employee and employer would be deprived of the potentially useful initial reaction of the agency. At present, a favorable initial ruling by the agency may be critical to the employee's ability to obtain counsel on a contingent fee basis.[113]

Another issue concerns the desirability of requiring or encouraging an employee to exhaust employer-provided remedies as a precondition to an agency hearing.[114] Many firms today have internal mechanisms for the receipt of employee safety complaints; a few have contracted with outside companies to provide external private dispute-ventilation machinery.[115] Before a broad requirement for such programs is imposed, however, serious thought should be given to the fact that an exhaustion requirement may only retard employee access to the public adjudicatory process. Arguably, the exhaustion requirement could also provide the employer with an unfair opportunity for early discovery, possibly even before the employee has legal representation.

---

[108] 10 C.F.R. § 50.7(c) (1987).

[109] The Nuclear Regulatory Commission (NRC) has already taken this step. 10 C.F.R. § 50.7(e) (1987). Wage and Hour Division regulations impose other notice-posting requirements. 29 C.F.R. § 500.76(d)(1) (1986); *see id.* § 516.4 (providing notice posting requirements for minimum wage and overtime provisions).

[110] Administrative Procedure Act, 5 U.S.C. § 551-559 (1982).

[111] *ACUS Whistleblower Hearings Transcript*, *supra* note 55, at 57-60 (testimony of Kennedy P. Richardson); *see* Letter from Kennedy P. Richardson to Jeffrey S. Lubbers, Director of Research, ACUS (Dec. 2, 1986) (suggesting, in alternative, that 30-day limit for Wage and Hour Division investigations be precatory).

[112] *See* 42 U.S.C. § 2000e-5(f)(1) (1982) (providing aggrieved persons may institute civil action if EEOC dismisses complaint or fails to sue within 180 days of filing of charges).

[113] *ACUS Whistleblower Hearings Transcript*, *supra* note 55, at 84 (testimony of Stephen M. Kohn). But it has been argued that:

> The hypothesis that the Wage and Hour Division investigation is necessary to induce private attorneys to prosecute section 210 cases is refuted by the fact that no such inducement has ever been necessary for common law wrongful discharge claims and the fact that section 210 authorizes the administrative law judge to award attorney's fees which may well exceed what the attorney would otherwise receive under a typical contingent fee agreement. Nor is the Wage and Hour Division investigation necessary to 'screen out' frivolous claims since most private attorneys will decline to undertake cases with no plausible merit.

Letter from Kennedy P. Richardson to Jeffrey S. Lubbers, Director of Research, ACUS (Dec. 2, 1986).

[114] *See ACUS Whistleblower Hearings Transcript*, *supra* note 55, at 14 (testimony of Sen. Charles E. Grassley) (suggesting agencies could be required to bring in outside counsel to identify and investigate employee concerns). Another approach

If such programs are required, the concerned agencies will have to address the discoverability of documents generated during the process[116] and the need to toll the statute of limitations during the exhaustion period. One attorney representing employers has indicated that documents and statements generated by both sides in the course of exhaustive internal channels would be discoverable.[117] On the basis of the information currently available, the public interest in prompt disposition of employee protection complaints outweighs the competing interest in potentially reducing the need for recourse to formal governmental processes. Certainly public policy "should not aim at driving every internal dispute toward litigation,"[118] but the system should also not create excessive hurdles.

E. *Adjudicatory Procedures*

Nowhere is the lack of consistency in federal protection of whistleblowers more apparent than in the arrangements Congress has set for the adjudication of complaints. In eight instances[119] (involving

---

might be to encourage or require professionals such as engineers to avail themselves of professional societies' safety committees when ethical issues arise. Unfortunately, however, these mechanisms are not well known. D. Lindorff, *Engineers' Duty to Speak Out*, The Nation, June 28, 1986, at 881. In addition, employees often do not have the luxury of being able to formulate a request for an opinion, and such committees lack the tools to find needed facts on issues which are often hotly contested.

[115] *See generally* Wargo, *Tracking Employee Concerns*, 32 Nuclear Industry No. 1, at 3 (Jan. 1985).

[116] Durham v. Butler Service Group, No. 86-ERA-9 (OALJ 1986), *discussed in Safety Concerns Programs Challenged by Intervenors*, Nuclear Industry, No. 6, at 16-17 (June 1986). Access to documents obtained under the SAFETEAM program marketed by a subsidiary of the Detroit Edison Co. was permitted subject to a protective order in Texas Utilities Electric Co., Nos. 50-445 to 446 (ASLB Dec. 23, 1985) (Comanche Peak Units 1 and 2). *See generally* Heffner, *Limiting Risk: Improving Public Perception of Nuclear Plant Safety Through SAFETEAM* (remarks at American Nuclear Society Annual Meeting, Nov. 12 1985).

[117] *See* Letter from Kennedy P. Richardson to Jeffrey S. Lubbers, Director of Research, ACUS (Dec. 2, 1986).

[118] *Id.*

[119] *See* sources cited *infra* p. 37 (Table 1).

cases arising under the environmental laws and the STAA), on-the-record APA hearings[120] and recommended decisions[121] are the task of the DOL Office of Administrative Law Judges,[122] subject to final action by the Secretary of Labor,[123] with the assistance of the DOL Office of Administrative Appeals. One source of concern has been the lack of detailed regulatory guidance concerning the procedures to be followed in connection with review by the Secretary of Labor.[124] The Department of Labor has shown its concern over the case backlog in the Office of Administrative Appeals.[125] The DOL should streamline the final layer of agency review by promulgating formal rules of appellate procedure. It has also been suggested that a three-member appellate panel should be created to review ALJ decisions in whistleblower cases, and to permit interlocutory appeals from ALJ decisions on certain issues.[126]

Like DOL, the NLRB, the Mine Safety and Health Review Commission, and the Interior Board of Land Appeals also provide on-the-record APA hearings. In railroad cases, the decisional body is the National Railroad Adjustment Board, which does not provide an APA hearing. In four categories of cases (nonappropriated fund employees, shipping containers, migrant workers, and OSHA), the adjudicatory mechanism is a civil action in district court.

Given the caseload of the district courts, reliance on conventional civil actions, rather than appellate court review of agency action, in several of these important anti-retaliation programs makes little sense. Further, in the case of complaints under section 11(c) of the Occupational Safety and Health Act,[127] such reliance makes no sense at all when combined with the fact that the complainant has no control over the litigation, i.e., if the agency chooses to dismiss a complaint, the employee can only appeal that decision within the Department of Labor;[128] there is no provision for judicial review of the agency's decision not to pursue a section 11(c) case and no private right of action under that provision.[129] This is in sharp contrast with the other provisions which permit an employee who is disappointed with the outcome of an agency APA hearing to seek judicial review.

---

[120] 5 U.S.C. § 556 (1982).

[121] 5 U.S.C. § 557 (1982).

[122] The applicable procedural regulations appear at 29 C.F.R. pt. 24 (1987). *See generally* S. KOHN, *supra* note 5, at chs. 1, 5-6, 8-9.

[123] 29 C.F.R. § 24.6 (1986); *see also* 5 U.S.C. § 557(b) (1982) (providing decisions by agency employees are final unless appealed).

[124] *ACUS Whistleblower Hearings Transcript*, *supra* note 55, at 70-71 (testimony of Stephen M. Kohn).

[125] *See* 73 DEP'T LAB ANN. REP. FY85 174 (1986) (noting survey performed by Inspector General revealing need to eliminate case backlog). As of October 1, 1986, the Office of the Inspector General reports to the DOL Undersecretary rather than the Solicitor of Labor. *ACUS Whistleblower Hearings Transcript*, *supra* note 55, at 21 (testimony of Judith E. Kramer).

[126] Letter from Mozart G. Ratner to Jeffrey S. Lubbers, Director of Research, ACUS (Dec. 10, 1986). The suggestion for an appellate panel appears to contemplate that the panel's jurisdiction would be nondiscretionary and that its decisions would not be subject to further review by the Secretary of Labor. *Id.* Alternatively, the panel could hear argument on behalf of the Secretary, as formerly was done in merchant marine disciplinary hearings. Fidell, *Improving Competence in the Merchant Marine: Suspension and Revocation Proceedings*, 45 MO. L. REV. 1, 23 n.151 (1980).

[127] 29 U.S.C. § 660(c) (1982).

There are wide discrepancies among agencies in assignment of the responsibility for representation of the employee. In MSHRC proceedings, the miner is represented by MSHA if the agency believes the complaint to be meritorious,[130] but in OALJ cases under the environmental laws, the Wage and Hour Division and the Secretary of Labor represent neither party.[131] Under the STAA,[132] the Assistant Secretary for Occupational Safety and Health can prosecute the trucker's case in the OALJ hearing.[133] Under the NLRA, the General Counsel prosecutes.[134]

The reasons for the discrepancies among the programs are difficult to fathom. One would think that the same rule should apply across the board, but it is not clear that every complainant will want or need the prosecutorial assistance of the investigative agency. Where the complainant is privately represented, the interest in careful husbanding of agency resources (including the need to limit what might otherwise be redundant presentations in the hearing) suggests that the agency should step aside, taking a more passive role in deference to the trial strategy of the party's chosen counsel. If the individual chooses to represent himself or herself, a more active agency posture would be appropriate to ensure a full and effective airing of the issues. In short, the investigative agency should not be required to represent a party who already has counsel, but the agency should be available to prosecute a meritorious claim if the complainant so desires.

---

[128] OSHA Inst. CPL 2.45A, ¶ 6 (Mar. 8, 1984).

[129] S. KOHN, *supra* note 5, at 174 (citing Taylor v. Brighton Corp., 616 F.2d 256, 258 (6th Cir. 1980)).

[130] *See* Federal Mine Safety and Health Act, 30 U.S.C. § 815(c)(2) (1982) (providing for filing of miner's complaints by Secretary of Labor where claims not frivolous); T. MEANS, DISCRIMINATION AND MINER'S RIGHTS UNDER THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977 21 n.105 (1984).

[131] WAGE & HOUR DIVISION, DEP'T OF LABOR, FIELD OPERATIONS HANDBOOK § 52x03(e) (1981).

[132] Surface Transportation Assistance Act of 1982, 49 U.S.C. § 2305 (1982 & Supp. III 1985).

[133] 29 C.F.R. §§ 1978.107-.108 (1987).

[134] 29 U.S.C. § 153(d) (1982).

The statutes frequently set forth a schedule for agency action on the employee's complaint.[135] These schedules are typically breached[136] and probably serve little practical purpose.[137] To the extent that they indirectly encourage hasty investigative agency positions in complex cases, they may well be counterproductive. However, both sides — and the ALJ — will sometimes agree that more time is needed to serve the substantive purpose of the statute. Litigants may and often do want to relax the schedule in a given case if, for example, more discovery is needed or unanticipated procedural or evidentiary complexities arise. Delays to which all parties consent do not account for all the cases, but they suggest that a rule of reason or *modus vivendi* evolves, whatever the statutory language. The extreme delays in some cases are, however, a matter of concern, whether consented to or not, and the responsible officials may want to ensure that case-tracking mechanisms exist to keep matters from getting out of hand.

Not surprisingly, both employer and employee representatives have expressed frustration with the current arrangements for DOL hearings. For example, employee counsel have called attention to what they perceive as a pattern of discovery abuse by industry counsel.[138] In one recent case, there was a dispute over whether an employer's counsel frustrated the employee's ability to obtain the testimony of a needed witness.[139] On the other hand, some believe that there is a danger that employees can, without fear of sanction, file frivolous claims that impose substantial costs on an employer.[140] This criticism overlooks the fact that if a complainant violates an ALJ's order, he may be held in default.[141] None of the statutes, however, provide for attorneys' fees to be awarded against complainants.

---

[135] *E.g.*, Toxic Substances Control Act, 15 U.S.C. § 2622(b)(2)(A) (1982); Energy Reorganization Act of 1974, 42 U.S.C. § 5851(b)(2)(A) (1982); Clean Air Act, 42 U.S.C. § 7622(b)(2)(A) (1982); Safe Drinking Water Act, 42 U.S.C. § 300j-9(i)(2)(B)(i) (1982); *see also* 29 C.F.R. § 24.6(b)(1) (1986) (providing for ALJ decision within 20 days of complaint filing, and final order by Secretary of Labor within 90 days after receipt of complaint).

[136] *Compare* S. KOHN, *supra* note 5, at 3 n.15 (noting statutory schedule for agency action is "more honored in the breach than in the observance . . . hearing and final decision of secretary are rarely conducted within. . .[statutory] time limits [and] respondents' attempts to have a complaint dismissed for failure to meet time limits have failed") *and* Letter from Julie Fosbinder, Teamsters for a Democratic Union, to Jeffrey S. Lubbers, Director of Research, ACUS (Dec. 1, 1986) (noting delays up to 600 days) *with* Brief for Appellants at 49 n.26, Brock v. Roadway Express, Inc., 107 S. Ct. 1740 (1987) (No. 85-1530) (suggesting that prolonged delay in secretarial decision is not typical under Surface Transportation Assistance Act) *and* U.S. DEP'T OF LABOR OFF. OF ADMIN. LAW JUDGES, SUMMARY OF "TRADITIONAL" LABOR CASES ADJUDICATED BY THE OFFICE OF ADMINISTRATIVE LAW JUDGES 56-57 (1984) (postponements granted only for compelling reason, and time constraints in whistleblower cases are "uniquely restrictive"). In one case arising under the Energy Reorganization Act, it took the Wage and Hour Division over eight months to conclude that the 30-day statute of limitations barred the complaint. Rose v. Secretary of Labor, 800 F.2d 563, 566 (6th Cir. 1986) (Edwards, J., concurring).

[137] These periods are treated as precatory. *See* 29 C.F.R. § 1978.114 (1987) (failure to meet deadlines does not invalidate Secretary's action).

[138] *Testimony of the Government Accountability Project and Trial Lawyers for Public Justice Regarding U.S. Department of Labor Administration of Whistleblower Protection Procedures Before the Administrative Conference of the United States* 4-6 [hereinafter *GAP-TLPJ Testimony*]; *ACUS Whistleblower Hearings Transcript*, *supra* note 55, at 71-72.

The failure of the current arrangements to provide for judicial enforcement of DOL subpoenas should be remedied as soon as possible by providing for enforcement of DOL subpoenas in the manner provided for other agency subpoenas.[142] Until Congress takes such action, the main protection against stonewalling in discovery is the availability of adverse inferences[143] or sanctions akin to those provided under Rule 37(b)(2) of the Federal Rules of Civil Procedure. Sanctions alone, however, do not provide a sufficient response to a willful failure to cooperate with discovery in a health or safety whistleblowing case; more is at stake in a whistleblowing case than merely the outcome of the individual action. The public interest may require that the facts be developed in such a case, not simply that the individual employee obtain relief, whether through sanctions or a settlement. Moreover, even with judicial enforcement of subpoenas, ALJ's should still be at liberty to draw adverse inferences or impose sanctions in the event of failure to allow discovery, because the requirement of applying to a federal court for subpoena enforcement may be too time consuming and costly for the party seeking enforcement[144] — even though enforcement proceedings are supposed to be summary in nature.[145] A party's failure to press for judicial enforcement of an agency subpoena should, for this reason, not preclude either adverse inferences or appropriate agency sanctions.

---

[139] *GAP-TLPJ Testimony, supra* note 138, at 4, 6 n.13; Galen, *An Ethical Furor Over a Witness,* Nat'l L.J., Dec. 22, 1986, at 3.

[140] *ACUS Whistleblower Hearings Transcript, supra* note 55, at 84-86 (testimony of Stephen M. Kohn). Mr. Kohn questions whether sanctions should be available to penalize an employee or his counsel for frivolous whistleblower complaints. *Id.* He suggests that sanctions may be unnecessary because Wage and Hour Division's investigation is suitable for spotting frivolous claims and that such sanctions would raise attorneys' costs too high for most complainants, many of whom are indigent. *Id*; *see also id.* at 97 (testimony of Mozart G. Ratner) (suggesting that very few whistleblower complaints are frivolous).

[141] 29 C.F.R. § 24.5(e)(4) (1986).

[142] Atomic Energy Act, 42 U.S.C. §§ 2201(c), 2281 (1982). *See generally* 3 B. MEZINES, J. STEIN & J. GRUFF, ADMINISTRATIVE LAW § 21.02 (1987); 1 K.C. DAVIS, ADMINISTRATIVE LAW TREATISE § 4.6 (2d ed. 1978); FED. R. CIV. P. 81(a)(3).

[143] *See* Industrial Union Dep't v. NLRB, 459 F.2d 1329, 1336 (D.C. Cir. 1972) (unfavorable inference from party's failure to produce evidence in its control).

[144] *Id.* at 1339.

[145] EEOC v. K-Mart Corp., 694 F.2d 1055, 1064 (6th Cir. 1982).

Misconduct by counsel — another of the charges levelled by the complainants' bar — is a serious matter that can thwart the achievement of congressional objectives and thereby endanger public health and safety. The arrangements currently in place give agency decisionmakers ample authority to penalize such misconduct, and this authority should be invoked upon a showing of good cause.[146] In the unlikely event that ALJ's prove to be indifferent on this score, the Secretary of Labor can be expected to take a firm stand on review. In addition, the usual forums for the consideration of ethical violations remain available. If the misconduct deprives a party of a fair hearing, the decision should be set aside on judicial review.

F. Remedies

The basic remedies available under the employee protection statutes consist of backpay, reinstatement, and attorneys' fees. In some instances, additional relief may be ordered. For example, a number of statutes authorize actual damages, and a variety of kinds of injury have been compensated under those provisions.[147] These include medical expenses, front pay, and job search expenses. In one ERA case, an employee was awarded $10,000 for mental pain and suffering and injury to reputation.[148] Another employee received $70,000 "to cover past and future medical expenses . . . and as recompense for . . . humiliation and mental suffering."[149]

Only two of the environmental employee protection provisions (SDWA and Toxic Substances Control Act (TSCA)) specifically authorize punitive damages. The Department of Labor has held such damages to be unavailable in other contexts.[150] The reason for this disparity is unclear, although TSCA[151] and SDWA[152] were developed from a common model. With no conceivable explanation for the differences available, a single rule should apply.

---

[146] *See* Hasan v. Nuclear Power Serv. Inc., No. 86-ERA-2 (OALJ Sept. 25, 1986) (disqualifying counsel for misconduct).

[147] S. KOHN, *supra* note 5, at 61-62.

[148] DeFord v. TVA, No. 81-ERA-1 (DOL Apr. 30, 1984) (following remand from DeFord v. Secretary of Labor, 700 F.2d 281 (6th Cir. 1982)).

[149] English v. General Elec. Co., No. 85-ERA-00002, slip op. at 18 (ALJ Aug. 1, 1985), *noted in* Franklin, *Dismissed Nuclear Worker Awarded $10,000*, N.Y. Times, Aug. 4, 1985, at 23, col. 1.

[150] Landers v. Commonwealth-Lord Joint Venture, No. 83-ERA-5, slip op. at 17 (1983), *noted in* S. KOHN, *supra* note 5, at 64 & n.18. Under several statutes, exemplary damages may be awarded if a civil action is brought to secure compliance with the Secretary's order. TSCA, 15 U.S.C. § 2622(d) (1982); SDWA, 42 U.S.C. § 300-9(ii)(4) (1982); ERA, 42 U.S.C. § 5851(d) (1982); CAA, 42 U.S.C. § 7622(d) (1982).

[151] 15 U.S.C. § 2622 (1982).

Agencies are also authorized to order the abatement of the employer's conduct as well as "affirmative action," although little, if any, use has been made of the latter power. Future cases will probably see increasing use of the affirmative action power.

Under the FMSHA[153] and STAA,[154] Congress authorized interim relief in the form of temporary reinstatement while the employee's complaint is pending. Significantly, the STAA provision has been sustained against constitutional challenge.[155]

Other remedies may be available through the program agency if, for example, the agency licensed the employer in some fashion. Under the Atomic Energy Act,[156] the NRC has taken administrative action against licensees because of retaliation against whistleblowing.[157] However, as the NRC has indicated, "the action taken by NRC focuses on the licensee to change the conduct of the discriminator. It is not a direct remedy to the employee."[158]

G. Judicial Review

The arrangements for judicial review fall into two basic categories.[159] In the case of surface mining and railway whistleblowing, review lies in the district court, whereas in other cases review lies in the court of appeals. Once uniform agency hearing procedures are achieved, uniform review at the court of appeals level would be appropriate given the similarity of issues in such cases. Since surface mining cases go through the Interior Department hearing process witn review by the Board of Land Appeals, there seems to be no reason to require an intermediate stop at the district court.[160]

---

[152] 42 U.S.C. § 300f (1982).

[153] 30 U.S.C. § 815(c) (1982).

[154] 49 U.S.C. § 2305 (Supp. III 1985).

[155] Brock v. Roadway Express Inc., 107 S. Ct. 1740 (1987). *But see* Southern Ohio Coal Co. v. Donovan, 774 F.2d 693 (6th Cir. 1985) (holding unconstitutional certain procedures of Federal Mine Safety and Health Review Commission).

[156] Pub. L. No. 79-585, 60 Stat. 755 (codified as amended at 42 U.S.C. § 2011 (1982)).

[157] 10 C.F.R. § 50.7(c) (1987).

[158] Letter from A.B. Beach, Deputy Director, Enforcement Staff, Office of Inspection and Enforcement, NRC, to Jeffrey S. Lubbers, Director of Research, ACUS (Dec. 10, 1986).

[159] *See* sources cited *infra* p. 37 (Table 1).

[160] *See* Leber v. Pennsylvania Dep't of Envtl. Resources, 780 F.2d 372 (6th Cir. 1986) (state agencies not subject to employee protection proceedings), *cert. denied*, 106 S. Ct. 3294 (1986).

A more fundamental concern is the fact that under the OSH Act[161] and the Asbestos Hazard Emergency Reponse Act,[162] if the investigative agency declines to bring a civil action for the employee, the employee can neither obtain judicial review of that decision nor bring his own action against the employer. Agency decisions not to prosecute are understood to be nonreviewable, although the doctrine would seem to have no application where an individual employee has been harmed by the violation of a prohibition on retaliation. There is no apparent explanation for closing the courthouse doors to such individuals while keeping them open under so many of the other statutes. If nothing else, such an approach drives whistleblowing cases into the state courts under state doctrines, even though the federal interest may be paramount.[163]

H. Interaction with Program Agencies

As Senator Grassley stressed at the Administrative Conference's October 1, 1986 public hearing, it is important not only that the whistleblower be protected from retaliation, but also that the substantive safety and health concern be addressed.[164] This requires close coordination between the agencies responsible for the underlying regulatory program and those responsible for administration of the anti-retaliation provisions.

To date, the program and investigative agencies have taken some steps to foster coordination to achieve better compliance with underlying safety and health obligations. The Wage and Hour Division and the NRC have a memorandum of understanding (MOU) setting forth the working arrangements between their two agencies in nuclear whistleblowing cases.[165] Attorneys representing employees, however, view this arrangement as ineffective.[166] Similarly, OSHA and the

---

[161] 29 U.S.C. § 660(c) (1982).

[162] Pub. L. No. 99-519, § 211, 100 Stat. 2970, 2987 (to be codified at 15 U.S.C. § 2641).

[163] The fact that a section 11(c) case must be brought by the government harms employers by rendering inapplicable any statute of limitations. Marshall v. Intermountain Elec. Co., 614 F.2d 260 (10th Cir. 1980).

[164] The belief that no action will be taken to correct a problem which a whistleblower discloses tends to discourage whistleblowing. MERIT SYSTEMS PROTECTION BOARD, WHISTLEBLOWING AND THE FEDERAL EMPLOYEE 27-31 (1981), *cited in* Martin, *The Whistleblower Revisited*, 8 GEO. MASON L. REV. 123 (1985).

[165] 47 Fed. Reg. 54,585 (1982), *discussed in* Kansas City Gas & Elec. Co. v. Brock, 780 F.2d 1505, 1509-10 (10th Cir. 1985), *cert. denied*, 106 S. Ct. 3311 (1986); *see also* 29 C.F.R. § 244(a) (1986) (program agency to receive copy of all complaints).

[166] *See GAP-TLPJ Testimony*, supra note 138, at 10-11; Ryan v. Brock, No. 86-4058 (2d Cir. 1986) (ordering DOL to reopen ERA case on basis of NRC report).

NLRB have a MOU[167] for the coordination of litigation under section 11(c) of the OSH Act[168] and section 8 of the NLRA,[169] and MSHA and the Labor Board have entered into an agreement for the overlap in their jurisdictions.[170]

Other agencies, however, have not pursued the same approach.[171] For example, the Department of Transportation has only an informal working arrangement with the Department of Labor for cooperation in cases arising under the Surface Transportation Assistance Act,[172] and EPA (which has substantive responsibility for several environmental laws that have anti-retaliation provisions) has no written understanding with DOL. It also remains possible for a single act of retaliation to trigger more than one statutory scheme. If such a situation arises, the agencies should either be permitted to conduct a joint hearing or one should serve as "lead agency" for the dispute. If all federal anti-retaliation protections were consolidated, the potential for wasteful duplication would be avoided.[173] Given the fact that whistleblower protection is intended to protect public health and safety, formal arrangements should exist to ensure: (1) that all investigative agencies receive the necessary assistance from program agencies, particularly in cases where technical information is important; (2) that program agencies receive prompt detailed reports of the results of all whistleblowing and adjudicatory proceedings; and (3) that complaining employees be advised of the action taken by program agencies to remedy the safety problem about which the complaint was filed.[174]

---

[167] *See* Memorandum of Understanding Between OSHA and NLRB, 40 Fed. Reg. 26,083 (1975).

[168] 29 U.S.C. § 660(c) (1982).

[169] 29 U.S.C. § 158 (1982).

[170] Litigation Procedures, 45 Fed. Reg. 6189 (1980).

[171] *ACUS Whistleblower Hearings Transcript*, *supra* note 55, at 69-70 (testimony of Stephen M. Kohn).

[172] 49 U.S.C. § 2305 (Supp. III 1985); *see also* Letter from Anthony J. McMahon, Chief Counsel, Federal Highway Administration, to Marshall J. Breger, Chairman, ACUS (Sept. 29, 1986) (discussing limited role of Department of Transportation in DOL proceedings).

[173] In some instances, two remedial programs may work at cross purposes. For example, in Thomas v. TVA, No. SL07528610208 (MSPB May 9, 1986), a MSPB administrative law judge overturned the dismissal of a supervisor at a nuclear power plant who had been found by TVA to have discriminated against one of his supervisees. Although the supervisee had invoked the protection of the ERA, he did so after the statute of limitations had expired. TVA nonetheless took disciplinary action based on the supervisee's allegation, and it was that action that the MSPB proceeding set aside.

[174] *Cf.* N.Y. STATE-CITY COMM'N ON INTEGRITY IN GOV'T, REPORT AND RECOMMENDATIONS ON WHISTLEBLOWING PROTECTION IN NEW YORK 5 (Oct. 8, 1986) ("complainant should be entitled to be informed of final disposition of his complaint").

I. Access to Law and Interagency Doctrinal Growth

Two final and, to a degree, related concerns involve the public availability of decisional law and the impediments to interaction between the separate bodies of law being developed by the various adjudicatory agencies responsible for whistleblower statutes. While decisions of the MSHRC, NLRB, and Interior Board of Land Appeals are reported, those of the DOL Office of Administrative Law Judges were not.[175] OALJ decisions were available only in Washington,[176] the Department office responsible for a substantial portion of the overall whistleblower caseload. The result was that litigants before the OALJ had a more difficult time ascertaining the law. This caused proceedings to be less focused, as well as made it more difficult for employers and employees to know their basic rights. In addition, it thwarted the desirable goal of cross-fertilization between the OALJ and other whistleblower adjudicatory agencies. This insulation makes little sense and, building on the statutory patchwork, tends to retard the development of a coherent body of law in this area.

The sufficiency of the publication of the OALJ decisions remains an open question. At present, research that steps from one anti-retaliation program to another is needlessly cumbersome because of the variety of reporting services. Publication of the OALJ cases will only partially alleviate that problem. If digesting and indexing of whistleblowing cases continue to follow separate systems within each agency, the present network will have been only slightly improved.

This does not suggest that the bar currently confronts a "Tower of Babel" in the whistleblowing area, but the present arrangements necessarily leave the door open to doctrinal variations where they may be unwarranted. If Congress decides to bring all private sector health and safety whistleblowing jurisdiction under one "roof," with a single set of statutory provisions administered by a single agency, this concern will disappear. If Congress does not, serious attention should be given to integrating the reporting arrangements.

---

[175] The Department of Labor announced that it would publish all OALJ and Secretarial decisions in whistleblower cases beginning January 1, 1987. *ACUS Whistleblower Hearings Transcript*, *supra* note 55, at 76 (testimony of Stephen M. Kohn). The Department should be commended for this desirable step, since employees and employers will be better able to determine in advance the lawfulness of a particular issue. However, it would also be useful for the Department to publish pre-1987 decisions as well. This assumes that appropriate indices would also be provided.

[176] *Id.* at 70.

V. Recommendations

Clearly, Congress must address important questions regarding the current arrangements for the protection of private sector health and safety whistleblowers. Based on the findings outlined above, Congress and involved agencies should take the following steps.

Congress should enact omnibus whistleblowing legislation to replace all extant federal private sector health and safety whistleblowing provisions. This legislation should include: (1) protection for all private sector employees (including government contractor employees) and state and local government employees against retaliation for whistleblowing with respect to violations of federal safety and health requirements; (2) assignment of investigative responsibility to the Secretary of Labor for all private sector health and safety whistleblowing retaliation cases; (3) provision for on-the-record Department of Labor APA hearings[177] in all private sector health and safety whistleblowing cases, with discretionary review by the Secretary of Labor, judicial review in the courts of appeals, and enforcement in the district courts; (4) provision for a single definition of "protected conduct"; (5) provision for a single statute of limitations of not less than 180 days; (6) provision for a single set of remedies (including debarment and suspension of government contractors); (7) provision for a grant of subpoena power to the Secretary of Labor for whistleblowing investigations and hearings, with provision for judicial enforcement; and (8) provision for a grant of rulemaking authority to the Secretary of Labor with respect to investigative and adjudicatory procedures, notice-posting requirements, and mandatory coordination with program agencies.

Subject to the actions taken by Congress as recommended above, the Secretary of Labor should: (1) promulgate rules of appellate procedure governing practice and procedure in connection with the Secretary's review of decisions of the Office of Administrative Law Judges; (2) transfer all private sector health and safety whistleblowing investigative responsibility to the Occupational Safety and Health Administration, since (under section 11(c) of Occupational Safety and Health Act[178] and section 405 of the Surface Transportation Assistance Act[179]) OSHA currently receives by far the largest number of private sector health and safety whistleblowing complaints; (3) develop, in consultation with the agencies responsible for the substantive regulatory program, detailed written procedures, as nearly uniform as the Secretary deems practicable, for coordinating investigation, adjudication, and follow-up in whistleblowing cases; and (4) cause all ALJ and Secretarial decisions in whistleblowing cases to be indexed and published, including those rendered prior to January 1, 1987.

---

[177] 5 U.S.C. § 556 (1982).

[178] 29 U.S.C. § 660(c) (1982).

[179] 49 U.S.C. § 2305 (Supp. III 1985).

In addition to these changes, Congress and the Executive Branch may wish to address a number of related issues, such as the question of preemption. As was persuasively explained at a public hearing conducted by the Administrative Conference of the United States,[180] there is a considerable amount of whistleblowing litigation in the state and federal courts, resting not on federal whistleblowing protections, but on state law doctrines such as the public policy exception to the employment-at-will doctrine.[181] State law doctrines are evolving rapidly in this area, and it would be premature to consider legislation preempting state causes of action for retaliation that could be adjudicated in a federal forum. Given the current doctrinal ferment, the words of Justice Brandeis in *New State Ice Co. v. Liebmann*[182] come to mind:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.[183]

Or, as the First Circuit more recently put it in a different context, "[t]he cutting edge of reform should be left to uncoerced community initiatives."[184]

For the moment at least, bearing in mind the approach the Administrative Conference has taken,[185] the author recommends that states be permitted to continue to pursue their own courses of legal development. That process, so deeply rooted in our federal system, should not lightly be derailed, particularly at a time when all federal programs are under increasing scrutiny to prevent inappropriate intrusion into areas traditionally of concern to the states.

---

[180] *See generally ACUS Whistleblower Hearings Transcript, supra* note 55, at 76-83 (testimony of Anthony Z. Roisman) (discussing differing interests of federal and state governments).

[181] Fidell, *Nuclear Whistleblowing Issues in 1986* (remarks at Am. Nucl. Soc'y, Nov. 12, 1985), at 6 nn.7-9 (citing Lang v. Pacific Gas & Elec. Co., No. 60185 (San Luis Obispo Co., Cal. Super. Ct.), *on removal*, No. 85-6191HLH (C.D. Cal.); Herman v. H.P. Foley Co., No. 59672 (San Luis Obispo Co., Cal. Super. Ct.), *on removal*, No. 85-2246-RG(Bx) (C.D. Cal. May 20, 1985); Stokes v. Bechtel N. Am. Power Corp., 614 F. Supp. 732, 735 n. 1 (N.D. Cal. 1985); Parks v. Bechtel Corp., No. C-84-8037-WHO (N.D. Cal.); Raymond Kaiser Eng'rs v. Superior Court, No. 8027975 (Cal. Dist. Ct. App. Aug. 23, 1984); Berstler v. Hirsch, No. 83-6122 (E.D. Pa. July 10, 1983); Atchison v. Brown & Root, Inc., No. 83-29889 (Harris Co., Tex. Dist. Ct.), *on removal*, No. H85-3568 (S.D. Tex.)). *Stokes* and *Parks* were remanded to the California courts. Stokes v. Bechtel N. Am. Corp., 614 F. Supp. 732, 735 n.1 (N.D. Cal. 1985).

[182] 285 U.S. 262 (1932).

[183] *Id.* at 311 (Brandeis, J., dissenting).

[184] Anaya v. Hansen, 781 F.2d 1, 7 & n.8 (1st Cir. 1986).

[185] Adminstrative Conference Recommendation No. 84-5, Preemption of State Regulation by Federal Agencies, 1 C.F.R. § 305.84-5 (1987).

Another issue potentially freighted with political considerations concerns the assignment of responsibility for adjudication of safety-based whistleblowing retaliation complaints. The processes that led to the creation of an independent Mine Safety and Health Review Commission *with* reponsibility for such cases and the creation of an independent Occupational Safety and Health Review Commission *without* such responsibility probably are of such a nature that recommendations for change will be of little use absent a definite consensus among the interested constitencies.

Under these circumstances, it may be best to confine the focus to more structural or adjectival matters, such as the enactment of uniform standards for protected conduct, adjudicatory procedures and remedies, strengthening the hearing process through judicially enforceable subpoenas, and rationalization of the arrangements for judicial review.[186] However, broader coverage should be extended to employees in industries having impacts on public health and safety, and all private sector health and safety federal whistleblowing protections ought to be administered by a single adjudicatory agency in the interest of fostering like treatment of like cases and maximizing the development of adjudicative expertise in employee protection matters.

Based on this study, there is reason for concern on several fronts. Aside from the overall need to restructure, extend, and rationalize the federal government's protection of health and safety whistleblowers in the private sector, the data indicate that in many cases it takes far longer than Congress contemplated to investigate and adjudicate whistleblowers' claims. Such delays, which may reflect resource problems, can also arise where the parties and ALJ conclude that more time is needed to do a proper job. Where the parties do not so agree, however, the delay may deter some complainants. Delay may ill serve employer interests as well.

In addition, the study suggests a need for greater interagency coordination. Consolidation of adjudicatory functions provides an important step toward the solution of the problem, but as long as numerous program agencies have an interest in the subject matter, the need for improved coordination will be substantial. The Department of Labor may want to consider addressing this problem by developing a program for regular interagency coordination of policies with regard to the protection of whistleblowers. This would result in a multi-agency omnibus memorandum of understanding and an established interagency coordinating body to encourage communication and interaction among the agencies and responsible staff.

---

[186] With respect to any recommendations regarding the allocation of responsibility for judicial review, the views of the Judicial Conference of the United States and the Federal Judicial Center should first be secured.

Finally, although nothing in this Article should be understood as intimating an opinion on whether justice was done in any particular whistleblowing case, it is concluded that: (1) 30-day statutes of limitation are unreasonable; (2) judicially enforceable subpoenas are essential to the conduct of effective whistleblowing adjudications; and (3) basic notions of fairness are offended when, under section 11(c) of the Occupational Safety and Health Act,[187] or section 211 of the Asbestos Hazard Emergency Response Act,[188] victims of retaliation have no access to the federal courts if their cases are not pursued by the Department of Labor.

CONCLUSION

The protection of private sector health and safety whistleblowers is an issue of fundamental workplace fairness and an issue affecting a large portion of the federal regulatory scheme. The current panoply of federal whistleblower statutes is complex and confusing, even to the experienced labor law practitioner. Although the increasing congressional interest in protecting health and safety whistleblowers is to be commended, the present conglomeration of statutes and regulations inhibits, rather than furthers, the rational development of law in this area.

The time is right for reform of the federal whistleblower protection scheme. The recommendations contained herein represent a substantial step forward toward a more rational and even-handed form of regulation. Indeed, the Administrative Conference of the United States has recently formally recommended many of the principal conclusions of this Article.[189] Moreover, legislation has been introduced that would achieve many of the same goals.[190] Without such action, we run the risk that the present arrangements, which were conceived as means of remedying real-life problems, will collapse under the crushing burden of complexity, inconsistency, and irrationality.

---

[187] 29 U.S.C. § 660(c) (1982).

[188] Asbestos Hazard Emergency Response Act of 1986, Pub. L. No. 99-519, § 211, 100 Stat. 2970, 2987 (1986) (to be codified at 15 U.S.C. § 2641).

[189] 52 Fed. Reg. 23,629, 23,631 (1987) (to be codified at 1 C.F.R. § 305.87-2).

[190] Uniform Health and Safety Whistleblower Protection Act, S. 2095, 100th Cong., 2d Sess., 134 CONG. REC. S1447 (daily ed. Feb. 23, 1988).

TABLE 1

PRIVATE SECTOR EMPLOYEE PROTECTION STATUTES

(Health & Safety)

Statute	*Program Agency*	*Investigative Agency*	*Adjudicatory Agency*	*Statute of Limitations**	*Judicial Review*
AHERA[191]	EPA	DOL	Dist Cts	90 days	N/A
CAA[192]	EPA	WHD	OALJ	30 days	Ct Apps
CERCLA[193]	EPA	WHD	OALJ	30 days	Dist Cts
DOD87[194]	DOD	DOD	None in Act	None in Act	N/A
ERA[195]	NRC	WHD	OALJ	30 days	Ct Apps
FMSHA[196]	MSHA	MSHA	MSHRC	60 days	Ct Apps
FRSAA[197]	DOT (FRA)	FRA	Nat'l RR Adjustment Bd	30 days	Dist Cts
ISCA[198]	DOT (USCG)	DOL	Dist Cts	60 days	N/A
LMRA[199]	NLRB	N/A	NLRB	6 mos	Ct Apps
MSAWPA[200]	WHD	WHD	Dist Cts	180 days	N/A
NLRA[201]	NLRB	NLRB (OGC)	NLRB	6 mos	Ct Apps
OSHA[202]	OSHA	OSHA	Dist Cts	30 days	N/A

---

[*] The limitation periods refer to the time for filing a complaint with the investigative agency, rather than for seeking judicial review.

191. Asbestos Hazard Emergency Response Act of 1986 (AHERA), Pub. L. No. 99-519, § 211, 100 Stat. 2970 (to be codified at 15 U.S.C. § 2641).

192. Clean Air Act (CAA), 42 U.S.C. § 7622 (1982).

193. Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601 (1982).

194. Department of Defense Authorization Act of 1987 (DOD87), Pub. L. No. 99-661, § 942, 100 Stat. 3816 (to be codified at 10 U.S.C. § 2409).

195. Energy Reorganization Act of 1974 (ERA), 42 U.S.C. § 5851 (1982).

196. Federal Mine Safety and Health Act of 1977 (FMSHA), 30 U.S.C. § 815 (1982).

197. Federal Railroad Safety Authorization Act of 1980 (FRSAA), 45 U.S.C. § 421 (1982).

198. International Safe Containers Act (ISCA), 46 U.S.C. § 1501 (1982).

199. Labor Management Relations Act (LMRA), 29 U.S.C. § 141 (1982).

200. Migrant Seasonal and Agricultural Worker Protection Act (MSAWPA), 29 U.S.C. § 1855 (1982).

201. National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-169 (1982 & Supp. III 1985).

202. Williams-Steiger Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. § 651 (1982).

SDWA[203]	EPA	WHD	OALJ	30 days	Ct Apps
SMCRA[204]	DOI (OS-MRE)	OSMRE	BLA	30 days	Dist Cts
STAA[205]	DOT (FHWA)	OSHA	OALJ	180 days	Ct Apps
SWDA[206]	EPA	WHD	OALJ	30 days	Ct Apps
TSCA[207]	EPA	WHD	OALJ	30 days	Ct Apps
FWPCA[208]	EPA	WHD	OALJ	30 days	Ct Apps

TABLE 2

PUBLIC SECTOR EMPLOYEE PROTECTION STATUTES

(Health & Safety)

Statute	*Program Agency*	*Investigative Agency*	*Adjudicatory Agency*	*Statute of Limitations*	*Judicial Review*
ASHDCA[209]	EDUC	None in Act	None in Act	None in Act	N/A
AHERA[210]	EPA	DOL	Dist Cts	90 days	N/A
CSRA[211]	OPM	OSC	MSPB	20 days	Fed Cir
DOD84[212]	DOD	DOD IG + Components	OASD(A)	None in Act or Regs	Dist Cts
EO12196[213]	All (less military)	DOL	Program Agencies	None	N/A

---

203. Safe Drinking Water Act (SDWA), 42 U.S.C. § 300f (1982).

204. Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1293 (1982).

205. Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C. § 2305 (Supp. III 1985).

206. Solid Waste Disposal Act (SWDA), 42 U.S.C. § 6971 (1982).

207. Toxic Substances Control Act (TSCA), 15 U.S.C. § 2601 (1982).

208. Federal Water Pollution Control Act of 1972 (FWPCA), 33 U.S.C. § 1251 (1982).

209. Asbestos School Hazard Detection Act of 1980 (ASHDCA), 20 U.S.C. §§ 3601-3611 (1982).

210. Asbestos Hazard Emergency Response Act of 1986 (AHERA), Pub. L. No. 99-519, § 211, 100 Stat. 2970 (to be codified at 15 U.S.C. § 2641).

211. Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C.).

212. Department of Defense Amendments of 1984, 10 U.S.C. § 1587 (Supp. III 1985).

213. Exec. Order 12196, 45 Fed. Reg. 1279 (1980).

Mr. **Fidell**. The basic arrangements, I think, have already been discussed, and what I want to do is proceed from major point to major point very briskly and then respond if you have any questions, sir.

There are two basic problems, it seems to me. The first is there is a complete procedural hodge-podge as a result of Congress' attending to one industry after another over the years. And Chairman Breger has already addressed some of the anomalies. The statute of limitations inconsistencies are probably the single most glaring inconsistency, but there are any number of others, and these are all addressed in my paper.

Beyond the procedural inconsistencies, there are the gaps in coverage, and understandably, the Conference has taken quite seriously the constraints imposed by statutory mandate. Not being quite as constrained by those, I will say that I think it is terribly important that Congress attend to those gaps. There is no reason why, if the Federal Government has a sufficient interest in a particular area that it regulates it for purposes of health and safety, that that regulatory program not include as well protection for those who come forward, such as the panelists this morning, and help the Government perform its regulatory functions.

It seems to me that a necessary corollary of a regulatory program is protection for whistleblowers from retaliation.

There are inevitably people who respond to proposals such as S. 2095 with the observation: "If it ain't broke, don't fix it." That is the easiest phrase to say in this city, and it has dealt an early death to too many meritorious proposals.

This system is broke, in my opinion; it is broke not only in the intricacies of the individual statutes for issues such as the ridiculous 30-day statute of limitations, to take a single illustration, but also in other respects.

One area that I think is particularly indefensible has to do with the provision under which whistleblowers who come forward with reports of violations of the Occupational Safety and Health Act cannot pursue their claims if the Department of Labor does not choose to pursue them for the whistle blower.

In a recent year, there were over 2,500 OSHA complaints of retaliation. I don't know how many, if any, were ever pursued by the Labor Department in District Court.

One of the things that has to be done, and one of the things this bill quite properly does, is remedy that situation so that if for any reason an individual finds the Labor Department not pursuing his cause of action, the individual can do so himself.

I might add, if I can give an illustration of how important this can be, on March 18th of this year, the United States Court of Appeals here decided the case of *Simpson* v. *Federal Mine Safety and Health Review Commission,* which was a petition for review of an order of that Commission in a discrimination or anti-retaliation case.

The matter was investigated by the Mine Safety and Health Administration, but the Mine Safety and Health Administration chose not to pursue Mr. Simpson's case. He pursued it himself. He won before the administrative law judge. The full Commission reversed, and the Court of Appeals then reversed the full Commission.

My point in citing this is as that it illustrates how important it is to permit an individual litigant, a complainant, to pursue his remedy whether or not the Federal agency responsible for investigation thinks it is meritorious. So far, Mr. Simpson is winning thanks to his own efforts rather than the Mine Safety and Health Administration's efforts. To its credit, I might add, however, the Labor Department did file an amicus curiae brief and helped him win in the Court of Appeals.

Beyond that let me—you have heard the gory details from some people who have been victims of the present gaps and deficiencies in the statutes—let me shift to a different plane.

When you have a body of legislation that is as inconsistent and as irreconcilable as what currently exists, Congress runs the risk of debasing public respect and esteem for the legal process as a whole. I believe this body of law has lost its coherence, and when that happens, the entire governmental process loses. It may be hard, it may be an elusive point to put into words or to tie down in one case or another, but I believe that's a real danger here, and one of the major things that the Senate can do in pressing this legislation is restore coherence in an area that badly needs it.

[The prepared statement of Mr. Fidell follows:]

Statement of

EUGENE R. FIDELL

Partner
Klores, Feldesman & Tucker
Washington, D.C.

on

UNIFORM HEALTH AND SAFETY
WHISTLEBLOWERS PROTECTION ACT

(S. 2095)

Before the

COMMITTEE ON LABOR AND HUMAN RESOURCES

SUBCOMMITTEE ON LABOR

UNITED STATES SENATE

July 26, 1988

Mr. Chairman and Members of the Subcommittee:

It is a pleasure to appear today before you in connection with S. 2095.

S. 2095 is important legislation and should be enacted as soon as possible to protect working men and women, to protect public health and safety and the environment, and to help both employers and the government do the important tasks Congress has assigned them. While it represents in large part an effort to rationalize an area in which the Congress has taken divergent positions over the years, this bill is more than simply a housekeeping measure.

Let me give you some background. Several years ago, I began to take an interest in the whistleblowing provisions of the Energy Reorganization Act of 1974, which provides protection for employees in the nuclear industry. After studying the subject, I concluded it was useful legislation in an industry obviously charged with the public interest.

While my initial focus was on the nuclear industry, my research disclosed that Congress had in fact put in place a variety of these measures, covering, in patchwork form, a range of areas of industrial and other activity in the country. The problem, however, was that there was little rhyme or reason to these enactments. They varied from one to another on questions as fundamental as the applicable statute of limitations (ranging from 30 days to six months), descriptions of protected classes and protected conduct, the types of remedies available, and the procedural arrangements for vindicating the rights created. In short, it was a legislative Tower of Babel.

I also noted that there were important gaps in the legislative hodge-podge; key industries that one would have thought would be protected were not, such as aviation and food and drugs. My judgment is that the process of divergent industry-by-industry legislation--a process that is continuing even now with measures designed to protect whistleblowers in the aviation field--can overwhelm the law by eroding public confidence in the fundamental coherence of the governmental process.

Another point that struck me (as it has others) as quite indefensible is the fact that at present, if the Department of Labor chooses not to pursue the retaliation case of a whistleblower under the Occupational Safety and Health Act, the employee cannot do so on his own. Since there are thousands of such cases each year, and few if any are ever pursued by the Department, this is a serious, substantive deficiency.

To its credit, the Administrative Conference of the United States agreed that a study was appropriate to try to render order out of this chaos. The ACUS process included a public hearing at which the speakers included Senator Grassley, representatives of the Department of Labor and spokesmen for industry interests as well as whistleblowers. There also was robust debate within the ACUS Committee on Adjudication, chaired for this purpose by Bill Quillen, the Council of ACUS, and the full Administrative Conference. A recommendation was approved last year, which I assume will be made part of the record of this hearing, since it tells much of the story of this bill.

My own study, underlying the Administrative Conference recommendation, has already appeared in the Congressional Record, and is reproduced in slightly modified form in the latest issue of the Administrative Law Journal published by American University's Washington College of Law. At this point I would like to acknowledge again the able assistance of Michael P. Lagnado, who served as my research assistant under a stipend from the Conference, and who has since graduated from the National Law Center at George Washington University.

S. 2095 does what I think ought to be done to ensure the free flow of information to government agencies. It rationalizes the current array of procedures and deadlines, and puts the decisional authority in a single adjudicatory agency: the Office of Administrative Law Judges of the Department of Labor. The hearings will be on-the-record, formal evidentiary proceedings under the Administrative Procedure Act and direct review will be available, on the agency record, from the United States Court of Appeals.

In addition, the bill does what the Administrative Conference suggests in the sense that Congress will have focused specifically on the question of preemption of state remedies and on the need to ensure that fields of industrial activity that are not presently covered by federal whistleblower protection secure such coverage in the public interest.

The measure does not preempt state law. I concur in this approach because ousting state law would raise serious federalism questions, and it is important in an area such as this that the states be afforded an opportunity to express their differing views of public policy. The law of whistleblowing is fast-moving, and I believe the traditional common law process of doctrinal development on a case-by-case basis (as well as legislative intervention, of course) is appropriate so that we can learn from mistakes and differing approaches. Perhaps experience in the future will teach that preemption is necessary, but no such lesson can be derived at the moment.

The Administrative Conference was loath to address the question of extending whistleblower protection to presently uncovered areas of commercial activity because it feared that doing so might overstep the limits of its responsibility for matters of agency procedure, rather than substantive legislative judgment. I understand and applaud that reluctance because I think it important that ACUS maintain its institutional credibility. However, Congress obviously has broader responsibilities. I believe--and this bill properly reflects--that Congress should provide full, effective protection for any person who brings forward information important to health and safety concerns in an area regulated by the federal government for health and safety purposes. If a field of human activity is sufficiently charged with the public interest--whether through the Commerce Power or otherwise--to warrant federal regulation in the first place, it is my conviction that a necessary corollary is to protect those who come forward with information regarding health and safety problems, including workplace safety, public health and the environment.

I expect that the Committee will hear objections to this bill from two quarters: "industry" and personnel of one or another federal agency who may lose some "turf." Concerns from these and any other quarters should be carefully explored, but I believe that on balance they will be shown to be insubstantial. Let me tell why:

From an industry perspective, this is--or ought to be--desirable, constructive legislation. It is emphatically in the interest of any right-thinking industrial or commercial firm to have whistleblower legislation on the books because prudent management will want to know if there are safety or health problems in the plant or other operation. They of course do not like it when a worker comes forward with a safety complaint, but surely having the matter aired is preferable to burying it by simply firing the bearer of bad tidings. To anyone who owns stock in a corporation, as I suspect is the case with many in this room, S. 2095 is therefore key legislation. In this connection I think it critical to stress the Complaint Referral provision in § 7 of the bill. This ensures that information regarding the concerns will be brought to the attention of the agency with substantive responsibility for the field of regulation in question, and, through a reporting mechanism, the Labor

Department and interested parties will learn what, if anything, has been done on the merits of the controversy, as opposed to the protection of the whistleblower from retaliation.

You may also hear from representatives of agencies other than the Labor Department, resisting the loss of jurisdiction. These concerns--which should not be dismissed merely as the expression of parochial agency interests--were articulated in the development of the Administrative Conference recommendation, fully explored, and found to be unpersuasive. They must be resisted if any progress is going to be made towards rendering order out of the present chaos. The purpose of the bill is not to dilute the protection currently afforded to any employee. This should be made clear. And to the extent that the arrangements currently on the books on a selective basis operate unevenly at present, I hope the Committee will make clear its intent that the measure be so administered as to achieve not the lowest, but the highest, common denominator for protecting employees in federally-regulated fields of endeavor.

Finally, let me strongly recommend that this Committee not simply report out this bill and forget the subject. If S. 2095 becomes law, its operation should be explored in depth after 3-5 years' experience has been amassed. Perhaps attention could be given to requiring a "10,000-mile checkup" as a prelude to oversight hearings. If the system as rationalized by this measure works out, so much the better. Perhaps experience will teach that similar protection ought to be afforded to those who find themselves penalized by employers for disclosures concerning violations that involve federal programs other than those geared to health and safety. On the other hand, if the present measure proves to have some rough edges, let the matter be aired and improvements fashioned.

In addition, please note that the Administrative Conference made a variety of other related recommendations that do not require legislative action. To date, as I understand it, little or nothing has been done to address those aspects of the matter, and I hope the Subcommittee will obtain a full, detailed report from the Departmental witnesses concerning the steps being taken in this regard. After all, it has been over a year since the recommendation was approved by the Conference plenary session.

Thank you for considering these views. On a personal note, it has been a privilege, as a private citizen, to participate in both the identification of the problems addressed in the Administrative Conference's recommendation and the development of a legislative response. You, Mr. Chairman, deserve great credit for exercising leadership in this connection, as does Senator Grassley for having taken the time to testify in favor of added protection for whistleblowers, thereby helping give this project a needed push at the right time. I trust that the members of this Committee will be equally unstinting in bipartisan efforts to bring the task to an early and favorable outcome.

I will be happy to answer any questions you may have, and would be pleased to work with Senators and staff to address any questions that may emerge in the course of these hearings.

Senator **Metzenbaum**. Thank you very much, Mr. Fidell.

I might say, my staff tells me that there only 25 out of 2,600 cases were followed through by the Department of Labor. According to my mathematics, that's less than one percent, which is hardly very encouraging.

This bill provides protection to employees in those industries currently unprotected by Federal law. Is that consistent with the recommendation for omnibus uniform legislation?

Mr. **Fidell**. The Administrative Conference, Senator, did not speak to the filling of gaps in the legislative panorama, in deference to the limits on its jurisdiction. What it did suggest was that Congress should focus on the question and make a reasoned decision, rather than let the matter proceed in the sort of episodic way that unfortunately is in the nature of the legislative process.

Senator **Metzenbaum**. Do you support this legislation?

Mr. **Fidell**. Absolutely.

Senator **Metzenbaum**. Did you examine State law in your study, and should Federal law preempt existing State whistleblower protection laws?

Mr. **Fidell**. The study examined State law in minor part. I certainly personally have examined that area, and I have given prayerful thought to whether there should be preemption. My judgment at this time is that preemption would be unwise. I think that notions of federalism play a role here. The States are developing, they are groping toward a sensible public policy, and I think the Federal Government can learn from the variety of legal experiences that the various States have had. Justice Brandeis said in *New State Ice Company* v. *Liebman,* the States are laboratories. We should permit those laboratories to continue with their work in this area, although we should not hold off Federal legislation in the meantime.

Senator **Metzenbaum**. This bill transfers authority for health and safety whistleblower protection from the agency with substantive jurisdiction for a particular area or industry to the Department of Labor. Why did you recommend such a transfer, and will the Labor Department have sufficient expertise to handle a variety of substantive investigations?

Mr. **Fidell**. Let me answer the second part of that first. The expertise involved in these kinds of cases is not the technical expertise of how to run a nuclear power plant, how to mine coal, how to, let's say, conduct airline operations. The expertise is expertise in labor relations and more particularly in the examination of retaliation against employees.

I believe that is an expertise. I respect the people at the Wage and Hour Division and other parts of the Department of Labor who have worked on these cases over the years. I think they are the experts. And I think one starts off from the wrong beginning point if you view this as a transfer of jurisdiction from the substantive or what I would refer to as the program agencies to the Department of Labor. The Department of Labor already investigates the vast bulk of these cases through the Mine Safety and Health Administration, through the Wage and Hour Division, through the Occupational Safety and Health Administration. What we are talking about, therefore, is a consolidation.

Senator **Metzenbaum**. I thank you very much, and I thank you, Mr. Breger. We look forward to working with you, because we would like to expedite the process. If it is at all possible, we are going to try to pass this bill or some modification of it yet this session. I am aware of the constraints of time, but I also feel optimistic that there is good feeling and a need for the legislation, and we ought to do it as soon as possible.

Thank you very much, Mr. Fidell. Thank you, Mr. Breger.

[Additional material submitted for the record follows:]

U.S. Chamber of Commerce

1615 H Street, N.W.
Washington, D.C. 20062
202/463-5602

Albert D. Bourland
Vice President
Congressional Relations

August 4, 1988

The Honorable Howard M. Metzenbaum
Chairman
Subcommittee on Labor
Committee on Labor and Human Resources
Washington, D.C. 20510

Dear Mr. Chairman:

The U.S. Chamber of Commerce, the world's largest federation of business companies, chambers of commerce and trade and professional associations, offers its views on your bill S. 2095, the "Uniform Health and Safety Whistleblower's Act."

Private-sector employees should be able to report unlawful or hazardous activities that endanger public health or safety without fear of personal reprisal, and many industries have structured reporting programs that give full and fair hearings to such allegations. Unfortunately, S. 2095 fails to recognize these in-house reporting practices and procedures. However, they should not be bypassed in the interest of expediency.

Further, there are issues here that, the Chamber believes, should be examined carefully in the context of this legislation.

- o Employers, who are in the best position to eliminate safety and health hazards that occur in the workplace, should have an opportunity to do so, prior to allowing a disgruntled employee to bring an action to remedy a hazard. The Chamber believes that S. 2095 should encourage the use of existing internal controls first and, if necessary, then allow the employee to appeal to the Regional Director of the Department of Labor. Many complaints are of a local nature, which may afford the Regional Director a familiarity with the issue that the Assistant Secretary may not have and, thus, expedite resolution of the complaint.

- o The range of employer activities that may be disclosed under section 4(a)(2) also raises concern. This section provides that assistance or participation in a proceeding with respect to any "activity, policy, or practice of an employer that the employee reasonably believes creates a danger, is protected." The Chamber believes that, as under existing whistleblower statutes, such protection should be limited to proceedings involving only alleged violations of federal law. To permit otherwise may subject an employer to frivolous actions and government monitoring of routine complaints in the workplace.

- S. 2095 would not prevent frivolous claims or accusations against innocent companies or individuals. Moreover, it would not deter disgruntled employees from filing false claims, nor would it provide for penalties or sanctions against employees making such assertions. The Chamber believes that S. 2095 should encourage the regulatory authority to consider during its deliberations balancing the seriousness of the complaint against the disruptive effect on the administrative operation of the company.

- S. 2095 would shift all the burden and risks to the defendant. A small business, in particular, is vulnerable to disgruntled employees, who by falsely alleging unlawful or hazardous activity could grant themselves tenure and complete protection from disciplinary action. Furthermore, a company could incur substantial expense and injury to its reputation while defending unmeritorious charges. At a minimum, S. 2095 should provide for the recovery of costs and attorneys' fees incurred by the wrongfully accused.

- Under most whistleblower protection statutes, an employee is required to consult with an employer prior to refusing to work. Under section 4(a)(3), this generally accepted fair labor-management condition is not required. The Chamber believes that this is a dramatic departure from present law and may severely alter labor-management relations in collective bargaining.

- The Chamber agrees that private-sector employees should be able to report unlawful or hazardous activity in the workplace without fear of reprisal. However, any legislative solution to this problem should not only apply to the private sector but also include federal-sector employees.

- The Chamber strongly believes that the whistleblower protections afforded to the private-sector employee by this bill should not lie if the employee knowingly participated in the unlawful or hazardous activity or could have prevented that activity from occurring.

- Finally, the term "employee" defined in section 3(3) as "any individual who is . . . an applicant for employment with an employer" is much too broad. Some companies consider but do not hire hundreds of individuals every year. S. 2095 would offer the rejected applicant a convenient means of retribution against an innocent employer.

Based upon the above factors, the Chamber is concerned about the complexities of S. 2095 and requests that they be comprehensively reviewed prior to further consideration of this legislation.

The Chamber requests that this letter be made a part of the hearing record on S. 2095.

Sincerely,

Albert D. Bourland

cc: Members of the Subcommittee on Labor
James J. Brudney, Counsel
Robert M. Guttman, Minority Counsel

THE FORUM

of United States Administrative Law Judges

****

P.O. Box 44337
Washington, D.C. 20026-4337

May 11, 1988

Honorable Howard M. Metzenbaum
Chairman, Subcommittee on Labor
Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510-6300

Dear Chairman Metzenbaum:

In our letter to you dated May 3, 1988, we enclosed a statement concerning S.2095, the proposed Uniform Health and Safety Whistleblowers Protection Act. Upon reflection we have revised that statement to delete paragraph 3 on page 2 and paragraph 1 on page 3 along with the related footnote 7. Please substitute the enclosed statement dated May 6, 1988 for that prior statement.

We are making this change because we now believe that sections 5(b)(2) and 5(c) of the proposed bill do provide a procedure to permit an individual "whistleblower" to file a complaint on his own behalf and to request a hearing before an administrative law judge in cases where the "Assistant Secretary" has initially found no violation of the Act.

We observe however that the proposed bill would nevertheless have the effect of eliminating other significant procedural protections now afforded under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et. seq. As we note in our statement, under that Act, "whistleblower" cases as well as other cases of unlawful discrimination are now heard before an administrative law judge in the independent Federal Mine Safety and Health Review Commission and the trial judge's findings of fact are protected by the substantial evidence rule. This statutory arrangement provides the assurance as well as the appearance of an independent administrative judiciary which is not subject to influence by the investigating and prosecuting agency.

We believe that the loss by mine workers of substantive protections under the proposed bill also remains a serious problem. These problems are detailed in our statement. Under the circumstances we continue to urge that S.2095 be modified as suggested in our statement to remove section 105(c) of the Federal Mine Safety and Health Act of 1977 from the list of preempted statutory provisions.

We would appreciate the opportunity to testify at any hearings regarding the proposed bill or, in the event that hearings are not held, to have the enclosed statement made a part of the record. We trust that the substitution of this statement for the statement previously sent under our cover letter dated May 3, 1988, has not caused any inconvenience.

Again, if you or your staff have any questions regarding this matter please call me at 357-9258 or Judge Gary Melick at 756-6261.

Sincerely,

Bruce L Birchman

Judge Bruce L. Birchman
Chairman, Legislative Committee

Enclosure

May 6, 1988

Statement of the Forum of United States Administrative Law Judges on S.2095--"Uniform Health and Safety Whistleblowers Protection Act"

The Forum of United States Administrative Law Judges is a professional organization which represents Administrative Law Judges in 30 Federal agencies. We believe that S.2095 should be modified to prevent the loss of the more comprehensive "whistleblower" and other protections that Congress has already specifically enacted for mine workers. The bill, as proposed, would significantly diminish the procedural protections now available to nearly one-half million mine workers under section 105(c) of the Federal Mine Safety and Health Act of 1977 ("Mine Safety Act"), 30 U.S.C. 815(c)1/.

In this regard the proposed bill provides in section 8 as follows:

(d) Federal Procedures.-It is the express intent of Congress to supersede the enforcement and administration procedures in applicable Federal laws by making the enforcement and administration procedures in sections 5,6, and 7 the exclusive enforcement and administration procedures.

(e) Definition.-For purpose of this section, the term "applicable Federal laws" mean-

***

(D) section 105(c) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 815(c));

***

1/ 30 U.S.C. 815(c)(1) provides as follows:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent or the representative of miners at the coal or other mine of an alleged danger or safety or health violation in coal or other mine, or because such

These provisions would have the effect of removing the significant procedural protections now afforded mine workers under the Mine Safety Act. Under section 105(c) of that Act "whistleblower" cases as well as other cases of unlawful discrimination are heard before an independent administrative judiciary in the Federal Mine Safety and Health Review Commission. The trial judge's findings of fact are protected by the substantial evidence rule and review of those decisions by the Commission is discretionary.[2] These procedures provide the assurance as well as the appearance of an independent administrative judiciary which is not subject to influence from the prosecuting agency.

S.2095, in marked contrast, provides for the investigation and prosecution of "whistleblower" cases, as well as the initial adjudication and first level of appeal of those cases, to be within the same agency, the Department of Labor. In addition, under the proposed bill the administrative law judge's findings of fact do not have to satisfy the stringent standards of the substantial evidence rule. These deficiencies underscore the need to retain the process under the Mine Safety Act which ensures administrative hearings before the Federal Mine Safety and Health Review Commission where there is continuity and expertise in their particular field.

(continued fn.1)

> miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

[2] The decisions of the Commission and its administrative law judges are reported, published and indexed in its own official reports and by two commercial publishers, the Bureau of National Affairs, Inc., in its Mine Safety and Health Cases and the Commerce Clearing House, Inc., in its Occupational Safety and Health Decisions. A substantial body of reported case law and expertise in mine safety discrimination matters has thus already been developed.

While Forum is particularly concerned with those aspects of the proposed bill detrimental to the procedural rights of mine workers we observe that the proposed bill also significantly diminishes the substantive protections that mine workers presently have under the Mine Safety Act. For example, under the proposed bill mine workers would no longer have the right to refuse work in conditions they believe to be unsafe or unhealthful unless the employee could prove that he reasonably believed that they posed an "imminent and substantial danger".

Under present law a miner has the right to refuse to work if he has a good faith, reasonable belief that it involves a hazard. See Miller v. Consolidation Coal Company, 687 F.2d 194, 195-196 (7th Cir. 1982); Secretary on behalf of Robinette v.United Castle Coal Company, 3 FMSHRC 803 (1981). The right of miners to refuse hazardous work should not depend on a subjective evaluation of whether the hazard is "imminent and substantial." In addition, hazards such as excessive respirable coal dust and excessive noise do not ordinarily pose an "imminent and substantial" danger. However they can result in hearing loss and death or disability from black lung disease (pneumoconiosis). Refusal to work under such conditions is protected under the Mine Safety Act.

The proposed bill would also abolish other significant mine worker protections in activities not commonly known as "whistleblowing." Thus miners could no longer recoup the cost of required miner health and safety training and related lost wages as they now can in proceedings under section 105(c)(1) of the Mine Safety Act. Under present law representatives of miners are also protected against retaliation even though they may not be employees of the mine operator who caused the discrimination. Thus it has been held to be unlawful discrimination under section 105(c)(1) of the Mine Safety Act for an employee of a union who has been elected by the miners to represent them in health and safety matters to be denied entry into a mine to perform safety inspection duties as a representative of the miners. These very important protections would be lost under the proposed bill.

Forum accordingly urges that the comprehensive "whistleblower" and other procedural and substantive protections now provided for mine workers under the Mine Safety Act be retained. More specifically we recommend that section 105(c) of the Mine Safety Act be removed from the list of the preempted statutory provisions in the proposed bill. Such a modification would be consistent with the proposed bill's exclusion of section 7 of the National Labor Relations Act, and section 502 of the Labor Management Relations Act, which provide whistleblower safety related work refusal protection under the Labor Act.

Proposed Corrective Amendments to S.2095

We suggest that:

(1) Subsection (4) of section 3 be amended by striking "or any State or political subdivision of a State" and inserting", any State or political subdivision of a State, or any operator of a coal or other mine as defined in section 3 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 802)."

(2) Section 8(e)(1) be amended by striking the following: "(D) Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c));" and by redesignating subparagraphs "(E)" through "(N)" as "(D)" through "(M)".

(3) Section 8 be further amended by adding at the end of subsection (e) the following new subsection:

"(f) For purposes of this section the term "applicable Federal laws" does not include any protections or provisions of law contained in section 105(c) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 815(c))."

Lau[illegible]*wler*

[illegible]

Route 2, Box 186
Alto, GA 30510

Phone
404-778-3769

July 29, 1988

COMMENTS TO THE U.S. SENATE COMMITTEE ON LABOR & HUMAN RESOURCES
Submitted by Laurie Fowler
on behalf of the American Civil Liberties Union of Georgia

I appreciate this opportunity to make comments concerning the "Uniform Health and Safety Whistleblowers Protection Act." The ACLU of Georgia has litigated a number of whistleblower cases and we know firsthand of the need for a comprehensive whistleblower act. We particularly endorse those new provisions that correct the deficiencies of the existing whistleblower provisions in the Energy Reorganizations Act, Toxic Substances Control Act, and others.

Expanding the statute of limitations from 30 days to 180 days is absolutely essential to the integrity of the Act; a limitation of one year would be even more appropriate. When most folks are fired from their jobs, they are devastated, particularly those conscientious, reliable employees whom this Act will protect. Legal action is the last thing they may think of. Instead they are concerned with finding new employment, collecting unemployment for the interim, refinancing their homes, etc. It takes more than 30 days for many to even determine that they have legal recourse. Expanding the filing time ensures that more whistleblowers will be protected by the law; it will also cut down on the number of non-meritorious whistleblower cases as attorneys will have more time to investigate cases before they file a complaint.

Certainly the posting requirement is necessary; the law is of limited use unless workers are aware of the protection it affords. In one of our cases, the employee, Georgia Power Company, claimed it had prominently posted a form notifying workers of their rights under the Energy Reorganization Act around its nuclear plant. We discovered that the form it claimed to have posted had, the preceding year, been found "ambiguous and misleading" by the Nuclear Regulatory Commission. Yet Georgia Power Company never replaced the form and apparently the NRC inspectors at the plant never noticed. Department of Labor inspectors should periodically check the workplace to ensure the proper forms are, in fact, prominently posted. Employers should be required to give each employee a written explanation of his or her whistleblower rights upon hiring and firing, as well.

Another provision we specifically endorse is the declaration that all time computations shall be made in accordance with the Federal Rules of Civil Procedure. I thought this was self-evident though the Energy Reorganization Act did not explicitly provide for it, but we actually had to litigate the point when we filed a complaint on a Monday, after our Client's literal 30 day statute of limitations expired on the preceding Sunday.

The requirement that the Secretary of Labor issue a ruling within 60 days of the receipt of an order for review (or within 360 days of filing the complaint, whichever comes first) also hits close to home. Over three years ago we filed a whistleblower complaint on behalf of five nuclear plant workers at Georgia Power's Plant Vogtle. Over two years ago, a procedural issue was referred up to the Secretary of Labor for a ruling. We still have not received a ruling from the Secretary of Labor and have therefore been unable to proceed with the case. In the meantime, two of the workers have been unable to find new jobs.

Several times we have found that the DOL and OSHA employees responsible for handling the whistleblower cases we have brought have been unfamiliar with the requirements of the laws they are charged to administer and enforce; a few weren't even aware that whistleblower protection existed. Of course we spent a lot of valuable time educating these folks and litigating non-issues as a result of their ignorance (i.e. the matter of time computations). This would no longer be necessary if the administration and enforcement of whistleblower protections were centralized within the Department of Labor as proposed by this Act.

For the reasons enumerated above, we endorse Senator Metzenbaum's "Uniform Health and Safety Whistleblowers Protection Act" and urge you to recommend its passage. Whistleblowers deserve our thanks and protection, not the censure often visited upon them.

July 29, 1987

Senator Howard Metzenbaum
Senate Labor and Human Resources Labor Subcommitee
Room 428
Derckson Senate Office Building
Washington, D.C. 20510

Dear Senator Metzenbaum,

I am Michael A. Coughlin and have worked for Simmons' Industries during 1984 and 1985 as a supervisor over the restaurant cut department. In the next pages I will try to explain the procedures that I witnessed and was apart of during my employment at the Simmons' Southwest City Plant.

Simmons is the third major food processor that I have worked for, the first being Union Warf. Corp. of Port Townsend, Washington (78 & 79, seafood processing), the second being Hudson Foods Inc. in Noel Mo. (another poultry processing industry). Because of these jobs, I have the knowledge and experience of food processing that I feel will be helpful to the Senate Subcommittee concerning their evaluation of the testimony given by Bette Simon on Tuesday 26, 1988 (hearing number: S2095). The only testimony that I have been able to read is that which was printed in our local newspaper on July 27, 1988. During my employment, I was the direct supervisor of the employee (for a period of six months) which provided the Senate with the testimony. To assist you during your review I have enclose as attachments:

1. Absentee Policy: dated- Oct. 20, 1986 and April 20, 1987
2. Employee Track Sheet
3. Description of Bette Simon's Job
4. List of Approved Equipment, USDA, page 75
5. Joplin Globe, Article: Lawmakers Hear 3 Whistle Blowers, July 27, 1988

In regards to Ms. **Simon's** charge that chickens were rinsed with water at such high pressure that chicken manure was forced into the meat, during my employment I never witnessed this nor to my knowledge has this been recorded by the USDA during on the job observations or the regular quality control laboratory testing. The rinsing system used is a Simon Johnson's Inside/Outside Final Bird Washer, which is approved by the USDA for this type of use (see attachment 4). The only other rinsing is done if the bird falls on the floor, and is accomplished by using a regular hose with a garden style nozzel. The water is the same as drinking water and the pressure is no more than found in a typical house, again a USDA approved proceedure. I would like to point out that if the Inside/Outside Final Rinse Bird Washer had the pressure to imbed manure into the meat, it would also have the pressure to rip the skin and meat off the bone as it passes through the process. This is the same rinse style as is used by poultry processing plants all across the nation. If the chicken meat could be contaminated through this process there would be a national problem which would have surfaced long before now.

In regards to the charges of maggot infestation on live birds, I myself have never witnessed this in any part of the plant or for that matter any other plant in which I have worked. I wish to stress to you that if this was witnessed by any employee, they were required to report this problem to management and the USDA inspectors. To my knowledge she never reported any infractions of quality control of this magnitude. Also any dead birds that come in must be and are accounted for by the amount, date, time and truck load. Then they are sent to the rendering plant for processing as dog food, ect... Through my personal knowledge I also know that chickens will eat maggots and that maggots will only live on rotting things. This statement in itself (made by Ms. Simon) is very hard to believe due to USDA inspections, my personal and common knowledge.

Ms. Simon's reference to having been forced into a more stressful job which resulted development of tendenittis in her hands and arms and later a discharge for accumulation of excessive disciplinary points is hard to believe. The title of Ms. Simon's new job was "swing crew" which is a premium pay job. This job would only have been given with Ms. Simon's agreement and oddly enough she had been in the position since 1-15-83, quite a long time before she felt the company was in her eyes doing wrong. I do not know why Ms. Simon was finally discharged, but my experience has always shown that the company dealt fairly with its employees. During my employment I never knew of any individual which was fired with out adequate cause, and a point you may wish to considered is that one of the employees which was directly involved in the "whistle blowing" used by 60 Minutes in 1987 is still employeed at the plant.

I would also like to point out that Ms. Simon's husband was discharged by Simmons' Ind. and subsequently filed suit in court alleging contamination from plant operations. This case has now been resolved in favor of Simons' Industry. Ms. Simon has also had two of her sons working in the plant both in their teens, and if the environment was so bad why would she allow her own children to work there? Also why has Ms. Simon waited for so long to make these accusations? Why were they not reported during her employment to the appropriate officials to save the public from harm? It seems odd that only now that her husband has lost his case and she has been dismissed, that the issue is worth talking about. As I have repeatedly expressed through out, I never witnessed any of the charges which Ms. Simon has expressed, and if I had I would have been one of the first to come forth in defense of public safety.

In closing I hope that this information will help your subcommittee in the dealing with this matter during the hearing. I would like to stress that I am no longer affiliated with Simons' Industries and am concerned that you would consider only one side in arriving at an end decision. I do think the hearing are a good thing for our country and our workers, so long as the whole story is told with both the employee and the employer having an opportunity to testify. America's bussiness and citizens need a safe and growing bussiness environment with protection to individuals who report unsafe practices that endanger anyone. Only so long as our system is not used for revenge by either the employee or employer will justice be served, both sides must be involved.

STATE OF MISSOURI)ss.
COUNTY OF JASPER)

On this 2nd day of August, 1988, before me appeared Michael A. Couglin, to me known to be the person described in and who executed the foregoing instrument; and acknowledged that he executed the same as as his free act and deed. IN TESTAMONY THEREOF, I have hereunto set my hand and affixed my official seal in Joplin, MO, the day and year last above written.

Respectfully Yours,

Michael A. Coughlin
206 Pearl
Joplin, Mo. 64801
417-623-5864

My commission expires 5/18/1991

MC/gr

Linda Coucherd
Notary Public

Copies provided to:

Senator Orin Hatch
Legal Council Guttman

1

SIMMONS
INDUSTRIES, INC.

P.O. Box 430
Siloam Springs
Arkansas 72761

To: All Employees

From: Corporate Personnel Manager

Subject: Disciplinary Action for Excessive Absences and Tardies: **Effective October 20, 1986.**

We have established a new Absentee Policy, which will be fair and equitable to all employees. The new policy is based upon a point system. The points will be as follows:

A.	1 point	when an employee is late or leaves early.
B.	2 points	when an employee gives advance notice and the absence is approved by personnel or manager of the complex.
C.	3 points	when an employee is absent and gives notice before their start time.
D.	4 points	when an employee is absent without advance notice or doesn't call in before their start time.

NOTE: SEVERE WEATHER MAY BE CONSIDERED FOR LATE ARRIVALS.

The following action will be taken when an employee reaches:

6 points	The employee will receive a verbal warning.
8 points	The employee will receive written warning.
12 points	The employee will receive a one day suspension.
16 points	The employee will be discharged for excessive absenteeism!

An employee who is absent for three (3) consecutive days without reporting in will be discharged.

Credits: An employee may improve their record by having four (4) consecutive weeks of perfect attendance. This will cancel 4 points. Each additional four (4) consecutive weeks will cancel 4 points. An employee may accumulate as many as 16 minus points.

The policy for probationary employees will be as follows:

4 points	will result in a verbal warning.
8 points	will result in a written warning.
12 points	will result in discharge for excessive absenteeism.

APPROVALS:

Mark C. Simmons, President

Ronnie Bradshaw

Ronnie Bradshaw, Corp. Personnel Mgr.

TOWN & COUNTRY

E
President's Award For Excellence

SIMMONS
INDUSTRIES, INC.

P.O. Box 430
Siloam Springs,
Arkansas 72761

1

To: All Employees

From: Corporate Personnel Manager

Subject: Absentee Policy - Effective April 20, 1987

This policy is based on a point system that gives points when you are absent, late, or leave early. You may erase points with good attendance.

The points for lates or absences will be as follows:

A.	1 point	When an employee is late or leaves early.
B.	2 points	When an employee gives advance notice, at least the day before the absence.
C.	3 points	When an employee is absent and gives notice before their start up time.
D.	4 points	When an employee is absent without advance notice and doesn't call in before their start up time.

Each additional consecutive workday absence will add 1 point per day up to a maximum of three additional points, provided the employee calls in each day absent or until a return to work day is established. If the employee does not do this, each additional day absent will cost 3 points. This applies to B, C, and D.

Points will not be given for the following absences:

1. Death in immediate family (same as bereavement pay)
2 Jury duty or subpoenas for court
3. On the job injury
4. Military duty
5. Vacation
6. Approved Leave of Absence
7. Suspensions
8. Severe weather may be considered for late arrivals
9. Hospital confinement

The following action will be taken when an employee reaches:

6 points	The employee will receive a verbal warning.
9 points	The employee will receive a written warning.
12 points	The employee will receive a final written warning.
16 points	The employee will be discharged for excessive absenteeism!

Any employee who is absent for three (3) consecutive work days without reporting in will be discharged.

Credits: An employee may improve their record by having two (2) consecutive calendar weeks of perfect attendance. This will cancel 2 points. Each additional two (2) consecutive calendar weeks will cancel 2 points. An employee may accumulate as many as 16 minus points.

APPROVALS

Mark C. Simmons, President

Ronnie Bradshaw

Ronnie Bradshaw,
Corporate Personnel Director

SIMMONS
INDUSTRIES, INC.

Phone #____________

-2

________ cc

EMPLOYEE TRACK SHEET

department ________

I.D.No. ________

Date of Employ. ________

Date of Birth ________

EMPLOYEE'S NAME ________

DAY/ DATE	A	E / L	EX	ADV / M.S.	DIS-APV	W / S	REASON FOR ABSENCE	EMPLOYEE'S SIG.	ABS. RATE%	PERS. INITIAL

A-Absent E-Early L-Late EX-Excused ADV. - Advanced Notice
Dis. Apv. Disapproved W- Warning S. - Suspension M.S. -Medical Slip

S.S.#________________________________

SIMMONS
INDUSTRIES, INC.

P.O. Box 430
Siloam Springs,
Arkansas 72761

3

SWING CREW PURPOSE AND REQUIREMENTS

PURPOSE

1. Fill in vacancies, for absentees, tardies, vacations.
2. Train new employees; train other swing crew members.
3. Possible source of supervisor trainees.

REQUIREMENTS

1. Good work performance and attitudes.
2. Ability to learn and perform other jobs.
3. Good attendance.
4. Learn the majority of jobs at line speed.
5. Attempt to do every job asked to perform.(Unreasonable refusal means removal from swing crew.)
6. Must not start or repeat rumors.
7. Report all problems and rumors to management.
8. Work closely with management.
9. Must have good attitude towards company, management and other employees by setting good examples.
10. Maintain a good absentee record. (No more than 8 points accumulated to remain on swing crew.

ELIGIBILITY FOR REASSIGNMENT TO SWING CREW:

1. An employee who has chosen to leave the swing crew will have to wait twelve (12) months from the time they resigned from the swing crew before they will be eligible for reassignment to the swing crew.
2. A former employee who had been on the swing crew and is rehired by the company is not eligible for the swing crew until at least one year since leaving the swing crew. In addition, this employee must have at least sixty (60) days continuous service after being rehired before being eligible for swing crew.

I have read the above and do agree to abide by the requirements.

TOWN & COUNTRY

PHONE AREA 501 524-8151 ● TWX 910 720-7261

E
Presidential Award

FDA, E12/2UM/UM FDA
Belts, Transilon E8/2 U08 FDA

SIMMONS ENGINEERING AND/OR SIMMONS INDUSTRIES, DALLAS, GEORGIA
Electric Stunner: Power Pak 5
Head Puller: SHP-1
Poultry Stunners: SF-5000, PS-5100, SF-7000, PS-7100
Prescalding Conditioner: PC-7000
Automatic Lung Machine: SL-8000
Automatic Oil Sac Cutter:SOS-9000 (If used prior to inspection station, surfaces contacting carcasses must be sanitized between each use with 180 F. water or solution of 20 ppm residual chlorine at point of use.)
Automatic Neck Cutter and Oil Sac Remover: SNCOS-1011 (If used prior to inspection station, surfaces contacting carcasses must be sanitized between each use with 180 F. water or solution of 20 ppm residual chlorine at point of use.)
Poultry Killing Machine: Electric SK-4, Hydraulic SK-5
Automatic Neck Cutter and Tail Remover: SNCTR 1011 (If used prior to inspection station, surfaces contacting carcasses must be sanitized between each use with 180 F. water or solution of 20 ppm residual chlorine at point of use.)
Neck/Skin Cutter: SNSC1011
Venter/Opener: SVO-1011 (Surfaces of machine contacting carcasses must be sanitized between each use with 180 F. water or a solution of 20 ppm residual chlorine at point of use.)
Belt Conveyor: SBC-..-...
Turkey Head Unloader: SHU-1011
Mixer: ...-1-. AM, ...-1-. AM
Fecal Remover/Bird Washer: SFRBW-1011 (To be used in pining room only.)
Inspection Platform: SIP-1700

[redacted]
KANSAS CITY, MISSOURI
Poultry Killer: (Kil-Kleen) 60-AK
Packing Machine (J-Pack): JPL
Packaging Machine "Packette 20": AS-...
Giblet Pack Machine: J-100 AFP
Giblet Pumping System: Chicken GPS
Deboning Turkey Shackle: TDS
Shackle Release: AKO-B
Bird Selector (Electronic): SS
Turk-E-Tie Unit: TT
Giblet Chiller (Modular): PGCR
"YANAGIYA" Deboner: Y-300
"YANAGIYA" Strainer: Y-1000
Chicken Scalder (2-Pass): CDFPF
Chicken Scalder (3-Pass): PFCS-3
Chicken Scalder (4-Pass): PFCS
Turkey Scalder (2-Pass): TDFPF
Turkey Scalder (3-Pass): TDCS-3
Turkey Scalder (4-Pass): TDCS
Turkey Giblet System: TGP-Modified
Cut-Up Bin: DBC-A
Poultry Chiller: PC-48, PC-60
Poultry Chiller Rotary Discharge Elevator: RDE
Conveyor Belt Splice: BC
Scrubber Type Picker: PS
Cut-Up Shackle: 11-CUSS
Turkey Evisc. Shackle: CT-ESS, TESS
Evisc. Shackle (Straight Shank): 2 EV-SS
Rigid Eviscerating Shackle: REV
Turkey Dressing Shackle: TD-SS
Shackle: BDNR-312-SS, CDNR-312-SS
Featherator Picker: TF-CL-4, TF-TI-4, TF-CL-8, TF-TI-8
Preflight Picker: PNP-CI, PNP-TI
Hooley Giblet Wrapper: JHGW
Lung Extractor: ALEP
Head Cutter (Single & Double): AHC
Automatic Head Cutter: AHC II...
Packaged Giblet Elevator: GE
Automatic Eviscerator (Manual positioning of viscera necessary for inspection. Surfaces of machine contacting carcasses must be sanitized between each use with 180 F. water or solution of 20 ppm residual chlorine at point of use.): AE, AE-II, AE-III
In-Line Giblet Chilling System: ILGPS
Piston Giblet Pump: CPGP
Hydro Spray Scalder: HSS
Automatic On Line Stunner: AOLS
Negative Air Offal System: NAOS
Combination Giblet Chiller: PNC-...., PNCR-....
Giblet Water Seperator: GWS
Product Conveyors: SBC
Straddle and Wing Picker: CP
Automatic Venting Machine: (Surfaces of machine contacting carcasses must be sanitized between each use with 180 F. water or solution of 20 ppm residual chlorine at point of use.): AVU-..
Demand Hand Wash Valve (Hand Activated): GJHW
Open Hand Wash Valve: GJOH
Water Rail Installation: WRI
Water Drain Hopper Assembly: WDH
Pickup Funnel: PF
Slide Valve Assembly: SV
Hydra Sieve Assembly: HS
Giblet Water Separator: SGWS
Automatic Bird Unloader: RAKO
Automatic Poultry Sizing System: "Chickway" CESS
Outside Bird Washer: OBWD
Combination Bird Washer: CAWD
"Low Vac" Cavity Vacuum Unit: VCU
[redacted]:
Belt Picker: BF-...
Automatic Opening Cut Machine: OC (Surfaces of machine contacting carcasses must be sanitized between each use with 180 F. water or solution of 20 ppm residual chlorine at point of use.)
Poultry Scalder (Low Profile) LPS...
Bird Unloader: 90 AKO
Positive Control Poultry Chiller PCC
Giblet Wrapping Machine: HSGW
Parts Sizing Shackle: PSS
Poultry Picker: D.D.P.
Thigh and Drum Deboner: D&H CD...
Poultry Sizing System: SJSS Consisting of: Sizing Scale: 5, Shackle: S S, Drop Station: SHDS
Automatic Venting Machine: AVU-..
Breast Splitter: LSBS 52-II
Automatic Killing Machine (Poultry): ASK III
Multi-Cut Automatic Cut-Up Machine: MC-60
Viscera Pak Remover: VPR
Inspection Work Platform: SJIWP
Inside/Outside Final Bird Washer: IOBW-16
Breast Deboning Machine: TBW 250
Automatic Opening Machine (Surfaces contacting carcasses must be sanitized between each use with 180 degree F water or solution of 20 ppm residual chlorine at point of use): OCIII
Inspection Platform: 421-000

SIMPLEX FILLER COMPANY
HAYWARD, CALIFORNIA
Filling Machine: 400, 440
Piston Filling Machine: AS-1, F-1
Twin Piston Fillers: T-1, Dual-F, DT-1

SINGER PRODUCTS CORP.
SMITHVILLE, OHIO
"Spiralveyor" Conveyor (S/S Frame): SCl
"Spiralveyor" Conveyor (Galvanized Frame): SC-2
Conveyor: SSB-..-..., SSC-....., SSB-1
S/S Roller Conveyor: SSC-5
Powered Roller Conveyor: SSC-6

SIRCY AND ASSOCIATES
NORCROSS, GEORGIA
Twin Line Cup Packaging Machine: DL-200
Filler: F-10

SMALLEY MFG. COMPANY, INC.
CONCORD, TENNESSEE

List approved Equipment

Lawmakers hear 3 whistle blowers

Former employee of Simmons plant among witnesses

WASHINGTON (AP) — Three workers who lost their jobs after bringing alleged safety problems to light in the food-processing, construction and aviation industries told a Senate subcommittee Tuesday that more protection is needed for whistle blowers.

Sen. Howard Metzenbaum, D-Ohio, chairman of the Senate Labor and Human Resources labor subcommittee, said workers who help avert disaster by reporting dangerous practices should be honored as heroes.

"Instead, in too many cases, they are treated like pariahs," said Metzenbaum, who has introduced protection legislation for whistle blowers. "Their reward is to be fired, harassed, demoted or blacklisted for telling the truth."

Former poultry worker Bette Simon charged that practices by Simmons Industries Inc. during her six years of employment at the company's plant in Southwest City, Mo., constituted a serious public-health threat.

She said parts from dead chickens were left for months on trailers used to haul live chickens to the plant.

"I observed live haul trailers arriving at the plant loaded with live chickens covered with maggots," she said. "The maggots fell on the employees and the floor. The floor became so slick and slimy at times that it was difficult for the employees to stand or walk on it."

Ms. Simon charged that the birds were rinsed with water at such high pressure that chicken manure was forced into the meat. She said the procedure was changed to a chlorine solution rinse that peeled the skin from the workers' hands.

Ms. Simon said she was closely observed by plant officials after she was seen talking with U.S. Department of Agriculture inspectors. She said she was later placed in more stressful jobs, developed severe tendinitis in her hands and arms, and eventually was discharged for accumulating excessive disciplinary points.

In April 1987, the USDA's Food

See Whistleblowers, 8A

Whistleblowers seek protection

Continued from Page 1A

Safety and Inspection Service issued an order requiring Simmons to comply with an intensified inspection program at the plant. Service spokeswoman Jane Adams said the company was taken off the intensified program in February, based on inspections at the plant and an improvement program.

Simmons President Lynch Butler said the company does not deserve the accusations.

"We are running a very clean operation at Southwest City," said Butler. "We are very proud of our plant. We have a lot of internal controls to see that good sanitary conditions are maintained."

Ronald Masters told the subcommittee that in 1982, he worked for the Daniel International Construction Co. as a quality control inspector at the Wolf Creek Nuclear Generating Station near Burlington, Kan.

Masters contended that in late 1983 and early 1984, he discovered that pieces of structural steel might not have been installed or might have been below specifications in a building designed for the handling of nuclear fuel. In February 1984, he said, he started to write the Nuclear Regulatory Commission about the problem.

"My superiors saw what I was doing, took the steel erection prints from me and went into the back room with the prints," he told the subcommittee. "They then falsely marked up the prints to make it appear the inspections had been done when in fact they had not."

Masters said that within days of his reporting his concerns to the NRC representative at the site, his superiors began a campaign to intimidate and harass him. He said he was laid off in August 1984.

Lyle Koerper, spokesman for Kansas Gas & Electric, which operates Wolf Creek, said the NRC extensively explored any allegations of construction problems at the plant before issuing a license in June 1985. Koerper said further comment would be inappropriate because Masters has filed a lawsuit against the utility.

"The NRC has licensed the plant, and there are really no unresolved issues," said Daniel spokesman Michael Burnette. "As far as the safety of the plant is concerned, we think that's been affirmed by the NRC."

Scott Buethe, now an engineering test pilot, told the panel that in 1979 and 1980, he worked for Britt Airlines, a commuter airline that served the Chicago and Indianapolis areas.

Buethe charged that on two occasions, he refused to fly passengers on planes until safety systems were repaired. He said that in both instances, the necessary maintenance was performed before the passenger flights were made, but that he was chastised by members of the airline management and later fired.

Britt was purchased last year by Continental Airlines. Continental spokesman Bruce Hicks said Buethe's allegations predate the airline's purchase of Britt by several years.

"My understanding is that this individual (Buethe) litigated the issue and lost," said Hicks. "His view may be one thing, but the court didn't agree."

Metzenbaum said current federal whistle-blower laws, enacted in a piecemeal fashion over a number of years, are a "confusing patchwork of protections."

The senator's bill would create uniform definition of protected whistle-blower activity for private-sector employees and give them 180 days to file a complaint. It would extend federal protection to whistle blowers in the aviation, maritime, pharmaceutical, food-processing and consumer-goods industries.

In addition, it would provide for on-the-record hearings before an administrative law judge, and enforcement through the district courts.

Fred Alvarez, assistant secretary of labor for employment standards, told the subcommittee that legislation could bring more consistency to the administration of whistle-blower laws. He said the department has some serious questions about the bill, including its "extremely broad reach." He said the agency is reviewing the measure.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

OFFICE OF THE CHAIRMAN

August 5, 1988

Hon. Howard Metzenbaum
Chairman
Subcommittee on Labor
Committee on Labor and Human Resources
U.S. Senate
Washington, DC 20510

Dear Mr. Chairman:

The Federal Mine Safety and Health Review Commission takes this opportunity to express its views on S.2095, the "Uniform Health and Safety Whistleblowers Protection Act." We respectfully request that this letter be made a part of the hearing record on S.2095. Since that record is closing today, time has not permitted coordination of this letter within the administration. The views expressed herein are, accordingly, those of this Review Commission only.

Our comments on S.2095 are restricted to the bill's effect on the enforcement and adjudication of miners' rights regarding matters of safety and health. We take no position as to the appropriateness of the legislation outside the mining sector.

As you know, S.2095 would repeal and supersede section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(the Mine Act). It is our considered view after careful study of S.2095 that its adoption in lieu of section 105(c) would result in a diminution of the protections presently afforded miners under the Mine Act. The scope of S.2095, both as to the individuals covered and the activities sought to be protected, is considerably narrower than that of the Mine Act. In addition, we believe that the procedural aspects of S.2095 compare unfavorably with those of the Mine Act.

Section 105(c) protects miners from retaliation for the exercise of their rights under the Mine Act - rights that extend beyond those associated with the term "whistleblowing." This anti-discrimination provision is inextricably linked to the overall enforcement scheme of the Mine Act which encourages miners to identify potential health and safety hazards and seek their correction. See, for instance, section 103(g), 30 U.S.C. 813(g), whereby miners may request an immediate mine inspection by MSHA if they believe a safety or health violation exists.

These protections extend to nonemployees such as miner representatives and applicants for employment as well. For instance, the Review Commission has held that a nonemployee union representative can be designated a miners' representative with the right to accompany MSHA representatives during mine inspections. Refusals to grant mine access to such nonemployees is protected by section 105 as is the right of miner representatives to report safety and health violations to MSHA. Likewise, applicants for employment are protected in part so as to prevent the practice of "blackballing" miners who have made safety and health complaints at mines where they were previously employed. By contrast, S.2095 limits the scope of its protection to employees only.

In the event that a miner, representative of miners or applicant for employment is "discharged, interfered with or otherwise discriminated against" in the exercise of his statutory rights to a safe and healthful workplace, his complaint is investigated and litigated by MSHA and adjudicated by this independent Review Commission. Thus section 105(c) serves an integral and important safety and health purpose beyond the individuals' discrimination complaint since vindication of the complaint leads to more vigorous enforcement of, and careful compliance with, mandatory safety and health standards.

As noted above, the protections of section 105(c) extend to activities beyond what could be considered "whistleblowing". For instance, section 105(c) protects a miner against retaliation and discrimination because "he is the subject of medical evaluation and potential transfer under a [health] standard published pursuant to section 101 [of the Mine act]." Consequently, if a miner is diagnosed as having pneumoconiosis (black lung), he has the right to transfer to a less dusty area of the mine without loss of compensation. This right is enforced by operation of section 105(c) which S.2095 would repeal.

While S.2095 intends to protect an employee's right to refuse work in the face of a hazard, the test applied in determining the legitimacy of that work refusal is much more strict than that which obtains under the Mine Act. Section 4(a)(3) of the proposed legislation limits work refusals to those occasions where the employee "reasonably believes" that the activity in question "poses an imminent and substantial danger to health and safety." By contrast, present law under the Mine Act requires only that the miner have a good faith, reasonable belief that the work involves a hazard to justify his work refusal. It would appear, therefore, that under S.2095 a miner would have to establish a much higher threshold of danger in order for his work refusal to be within the zone of protected activity.

The procedural protections afforded miners under section 105(c) cases are also, in our view, superior to those provided in S.2095. Under the Mine Act discrimination cases are heard before an independent administrative judiciary in this Review Commission. The trial judge's findings of fact are protected by the substantial evidence rule and review by the Commission is discretionary. These procedures provide the assurance as well as the appearance of independent review not subject to influence from the program agency (MSHA), particularly in those cases where the complaints are filed by miners on their own behalf under section 105(c)(3).

Additionally, section 105 provides for prompt temporary reinstatement of the miner, pending a hearing on the merits, if within 15 days MSHA determines that the miner's complaint is not frivolously brought. Thus, the Mine Act has an expedited mechanism to restore matters to the status quo ante upon a preliminary investigation into the complaint. Section 5(b)(1) appears to require a more extensive investigation and allows a lengthier time frame before temporary reinstatement can be obtained.

We note for the record that, procedurally, S.2095 would extend the time for filing complaints from 60 days as provided in the Mine Act to 180 days. The 60 day time period, however, was not intended to be a jurisdictional limit on miners' complaints and the Commission has consistently allowed extensions of time to file. Furthermore, the miner's initial complaint to the Secretary which prompts the investigation under section 105(c)(1) is not a formal filing; it is simply a written or oral assertion that the miner has been discriminated against for engaging in protected activity.

The proposed legislation has the potential of imposing greater "up front" costs on miners seeking to redress acts of discrimination. Under the Mine Act if a complaint is found to have merit, the Secretary, pursuant to section 105(c)(2), is required to represent the complainant in a hearing before this Commission and in any appellate proceedings thereafter. Section 5(c)(2) of S.2095 makes representation by the Secretary purely discretionary.

In summary, we at the Commission contend that section 105(c) has served to ensure that miners can exercise their safety and health rights without fear of reprisal. A sound and consistent body of caselaw has been developed within the mining sector for nearly two decades dating back to the 1969 Coal Mine Health and Safety Act. While there may be some value in seeking a degree of uniformity in the protection of employees who seek to have hazards corrected, we strongly urge that effective and proven programs not be preempted by omnibus legislation. In that regard, we refer you to p. 44 of the ACUS contractor's report reprinted at p. S1457 of the Congressional record (February 23, 1988):

> The processes that led to the creation of an independent Mine Safety and Health Review Commission with responsibility for such [whistleblowing] cases and the creation of an independent Occupational Safety and Health Review Commission without such responsibility probably are of such a nature that recommendations for change will be of little utility absent a definite consensus among the interested constituencies. [Emphasis added.]

Accordingly, we recommend that section 105(c) of the Mine Act be excluded from section 8 of S.2095.

The Office of Management and Budget has advised that, as indicated by the Department of Labor in its testimony before the Labor Subcommittee on July 26, 1988, S.2095 needs further review in a number of significant respects.

Thank you, Mr. Chairman, for the opportunity to comment.

Sincerely,

Ford B. Ford
Chairman

LAW OFFICES
BISHOP, COOK, PURCELL & REYNOLDS
1400 L STREET, N.W.
WASHINGTON, D.C. 20005-3502
(202) 371-5700

WRITER'S DIRECT DIAL

TELEX: 440574 INTLAW UI
TELECOPIER: (202) 371-5950

August 9, 1988

The Honorable Howard Metzenbaum
Chairman, Subcommittee on Labor
Committee on Labor and Human Resources
U.S. Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Attached please find material entitled: "A Critique Of The Underlying Rationales And Specific Provisions Of S. 2095 As They Would Apply In The Nuclear Power Industry."

This document has been prepared for review by the members of the Subcommittee on Labor and we respectfully request that it be made part of the official printed record of the hearing held on S. 2095 on July 26.

Sincerely,

Nicholas S. Reynolds

LAW OFFICES
BISHOP, COOK, PURCELL & REYNOLDS
1400 L STREET, N.W.
WASHINGTON, D.C. 20005-3502
(202) 371-5700

WRITER'S DIRECT DIAL

TELEX: 440574 INTLAW UI
TELECOPIER: (202) 371-5950

A CRITIQUE OF THE UNDERLYING RATIONALES AND SPECIFIC PROVISIONS OF S.2095 AS THEY WOULD APPLY IN THE NUCLEAR POWER INDUSTRY

August 9, 1988

Nicholas S. Reynolds
Richard K. Walker

A CRITIQUE OF THE UNDERLYING RATIONALES AND SPECIFIC PROVISIONS OF S.2095 AS THEY WOULD APPLY IN THE NUCLEAR POWER INDUSTRY

The authors of this commentary wish to express their appreciation to Senator Howard Metzenbaum, Chairman of the Labor Subcommittee of the Committee On Labor and Human Resources of the United States Senate, and to the staff of the Subcommittee, for according them the opportunity to submit their thoughts about S.2095 to be included in the record of the Subcommittee's hearing on the bill. The authors serve as counsel to nuclear power utilities and contractors before the Nuclear Regulatory Commission or the Department of Labor, and have handled numerous cases arising under Section 210 of the Energy Reorganization Act. Further, the authors have provided advice and counsel to nuclear power utilities on the interrelationships between atomic energy law and labor law, and on the structuring of programs to encourage employees to report safety concerns to management with the assurance that no adverse employment action will occur.

Our objective in submitting the commentary that follows is to offer constructive criticism of S.2095, and the fundamental concepts in which it is grounded. We hope that in doing so we can assist the Subcommittee and other interested members of the Senate by illuminating some of the problems that we believe could flow from any ill-considered legislation in this area.

If S.2095 were to be enacted into law in anything like its present form, it would represent one of the most dramatic governmental intrusions into the employment relationship in the nation's history. As such, it demands careful analysis and deliberate consideration of all potentially affected interests and likely consequences. Although thoughtful and thorough evaluation requires greater time and effort and is not always politically expedient in the near term, we believe that it is indispensable in this area where unwise legislation could have extraordinarily profound effects.

At the outset, we would like to emphasize that we share with those who support S.2095 a recognition that the health and safety of the workforce and the public are very important interests. We also believe that appropriate legal protections for whistleblowers can advance those interests and thus have a place in this nation's laws. Our concerns are with what legal protections may be appropriate, how they may be implemented, and how susceptible they are to being abused, and the extent to which they may reduce an employer's ability to maximize his efforts to ensure that employee and public health and safety are not endangered.

In our commentary below, we first analyze S.2095 in the specific context of the nuclear industry, where we show that the proposed legislation could seriously undermine public health and safety. In the next section of our critique, we point out a number of respects in which the procedures to be created by S.2095 are unworkable and unfair. In the concluding section, we show that in its overly zealous pursuit of its goals, the proposed legislation contravenes several constitutional and other important federal policies. For all of these reasons we conclude that, at least in the context of the nuclear power industry, S.2095 would be a most improvident law and should be thoroughly reconsidered.

TABLE OF CONTENTS

I. INTRODUCTION 1

II. THE REMEDIAL AND PROCEDURAL PROVISIONS OF S.2095 WILL SUBVERT, RATHER THAN REINFORCE, CONGRESS' REGULATORY PRIORITIES IN THE NUCLEAR INDUSTRY. 2

- A. The Expansive Definition Of Protected Activity In S.2095 Would Impair Nuclear Safety By Significantly Undermining Job-Site Discipline. 3
  - 1. Whistleblower protection legislation must be carefully distinguished from antiretaliation laws designed to expand employees' prerogatives vis-a-vis their employer. 4
  - 2. The proposed expansion of nuclear industry employees' prerogatives vis-a-vis their employers, on all matters relating to safety, will subvert nuclear safety by making jobsite discipline virtually impossible. 9
    - a. Because most nuclear industry employees engage in safety-related work most of the time, affording protection to in-house "disclosures" will immunize unsatisfactory performance from legitimate correction or discipline. 10
    - b. Thus, the fundamental assumptions underlying S.2095 are misconceived in the context of the nuclear industry... 14
- B. The Bill's Anti-preemptive Provision Will Necessarily Result In Undesirable Interference With Federal Regulatory Priorities. 15

III.THE BILL'S PROCEDURAL AND REMEDIAL SCHEME IS INHERENTLY UNWORKABLE, IMMODERATE AND UNFAIR 20

- A. The Provision Of Mandatory Punitive Damages Ignores Current Judicial Problems And Will Lead To Abusive Litigation. 20

B. The Procedure Created By S.2095 Is Chaotic And Ill-considered, And The Provision Of Double And Triple Jeopardy For Employers Is Unjustified And Patently Unfair........................ 24

1. The procedures of S.2095: A Horror Story.................................... 25

2. The multiple jeopardy created by S.2095 raises serious constitutional problems. ... 31

IV. THE PROCEDURE CREATED FOR THE ADJUDICATION OF WHISTLEBLOWER CLAIMS DENIES LITIGANTS OUR SYSTEM'S THREE MAINSTAYS OF FAIR AND IMPARTIAL JUSTICE....... 33

A. S.2095 Violates the Seventh Amendment By Denying Private Litigants Their Right to Trial By Jury. 34

B. S.2095 Also Violates The U.S. Constitution By Denying Private Litigants Their Right To An Article III Judge.............................. 37

C. S.2095 Violates The Fundamental Precept That A Party Cannot Fairly Judge His Own Cause....... 39

CONCLUSION 43

I. INTRODUCTION

In the famous exchange between Sir Thomas More and his zealous nephew, Roper, in Bolt's A Man For All Seasons, the saintly More vividly stated society's need for the measured administration of law.

> MORE. What would you do? Cut a great road through the law to get after the Devil?
>
> ROPER. I'd cut down every law in England to do that.
>
> MORE. Oh? And when the last law was down -- and the Devil turned round on you -- where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast -- Man's laws, not God's -- and if you cut them down -- and you're just the man to do it -- d'you really think you could stand upright in the winds that would blow then?

Robert Bolt, A Man For All Seasons, Act I, Scene 6. There can be no argument but that the law-abiding "whistleblower" should have a special place in the law, and that his mistreater, if there be one, deserves little sympathy. With the underlying aim of existing whistleblower protection legislation, then, we have no quarrel. In several respects, however, we believe that the proposed initiative not only falls well wide of its aims but also offends many of this country's most cherished policies and principles of law. We believe that the proposed law's inconsistency with other worthwhile federal priorities does not impeach the law's goals, but demonstrates that the existing scheme for nuclear whistleblower protection does a far better job than would S.2095 at accommodating the wide range of federal concerns entrusted to Congress' management.

As will be made clear in the materials that follow, we believe the proposed legislation suffers from two main defects. First, the substance and procedure of the bill are poorly thought out, resulting in numerous probable constitutional infirmities, procedural improprieties, and manifestly unfair results. Second, the bill rests upon a key, and false, assumption -- that whistleblower protection can and should be implemented in the same way regardless of the industries to which that protection might apply. At least in the context of the nuclear power industry, with which we are intimately familiar, this assumption has led to proposed legislation that would produce results completely contrary to those expected and desired.

II. THE REMEDIAL AND PROCEDURAL PROVISIONS OF S.2095 WILL SUBVERT, RATHER THAN REINFORCE, CONGRESS' REGULATORY PRIORITIES IN THE NUCLEAR INDUSTRY.

It is false to assume that the same whistleblower protection provisions should be applied uniformly to a host of industries that are themselves anything but uniform. With regard to the practical consequences likely to result should S.2095 be enacted, we show this by focusing our analysis upon the specific context of the nuclear power industry and the regulatory regime to which that industry is subject. In that context the operation of S.2095 would, in a number of ways, subvert those very health and safety policies the Bill is purportedly designed to advance.

A. The Expansive Definition Of Protected Activity In S.2095 Would Impair Nuclear Safety By Significantly Undermining Job-Site Discipline.

Section 4(a)(1) of S.2095 would protect from discipline any employee who "discloses, or demonstrates an intent to disclose" any conduct of his or her employer that he or she reasonably deems to be unlawful and dangerous. The unlimited breadth of this provision, which protects disclosures to anyone, is obviously unwise, since the sponsors of S.2095 surely do not seek to protect employees who "disclose" sensitive technological information to Soviet agents. But assuming that Section 4(a)(1) will be redrafted to reflect the sponsors' intent, it would more than likely protect from discipline those employees who "disclose" their concerns to their own supervisors -- as opposed to regulatory officials, communications with whom are protected under Section 4(a)(2).

In the specific context of the nuclear industry, the protections thus to be afforded by Section 4(a)(1) would undermine, rather than enhance, public safety. To see how this would be so, it is important, first, to understand the special function of "whistleblower protection" law within the universe of antiretaliation laws generally. Second, it is critical to bear in mind some of the unique features of the nuclear industry, so that one can see how such a law will function in this peculiar context.

1. Whistleblower protection legislation must be carefully distinguished from antiretaliation laws designed to expand employees' prerogatives vis-a-vis their employer.

Antiretaliation laws serve several different goals of three basic types. A review of the three distinct purposes for such laws reveals that they are not equally applicable in all situations, and thus illustrates the importance of protective provisions that are tailored to their particular setting. As will be shown, this is especially true in the context of the nuclear industry.

One goal for antiretaliation laws is employee safety. The clearest example of an industry where this goal is paramount is mining, an industry whose history is more deeply strained by human tragedy than any other. As the Courts of Appeals discerned in construing the whistleblower protection provision of The Federal Mine Safety and Health Act ("FMSHA"), miners faced with imminent physical danger must be free to protect themselves by protesting dangerous conditions to their supervisors or, if need be, by refusing to work. As the Court of Appeals for the District of Columbia explained, this reading of FMSHA § 110(b)(1) is dictated by "the central purpose of the Mine Safety Act" which is "to ensure the health and safety of miners." Phillips v. Interior Board of Mine Operations Appeals, 500 F.2d 772, 783 (D.C. Cir. 1974). This and similar decisions thus tailored the FMSHA whistleblower protection provision to serve the special nature of the industry to which it applies. That they did so correctly was proven in 1977 when Congress, noting these judicial decisions, specifically amended FMSHA § 110(b)(1) to extend its protections to employees who protest dangerous conditions at the mine. In S.2095, protection of this kind is made generally available by Section 4(a)(3).

A second type of antiretaliation law is far broader, since it directly confers and defines special rights of workers vis-a-vis their employers. Section 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), for example, prohibits retaliation against an employee "because he has opposed any practice made . . . unlawful . . . by this subchapter." This so-called "opposition clause" of Section 704 obviously has nothing to do with the employee's physical safety; nor is it concerned with the reporting of illegalities to the authorities -- a type of employee action that is specifically protected by other language in Section 704.[1] Instead, the opposition clause directly grants a prerogative to employees in their dealings with employers, a prerogative that encompasses confrontation and protest, and even refusals to work. Mozee v. Jeffboat, Inc., 746 F.2d 365 (6th Cir. 1984); Pendleton v. Rumsfeld, 628 F.2d 102 (D.C. Cir. 1980); Mitchell v. Visser, 529

1/ "It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made . . . unlawful . . . by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a).

F.Supp. 1034 (D. Kan. 1981). In this way, the opposition clause grants employees a limited license for insubordination.

Like Section 704 of Title VII, the National Labor Relations Act ("NLRA") confers broad employee prerogatives. Section 8(a)(3) of the NLRA prohibits any "discrimination" against employees that is intended "to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). Section 8(a)(3) is thus designed to protect the entire panoply of employee rights of organization and mutual support guaranteed in Section 7 of the NLRA (29 U.S.C. § 157). Like the opposition clause of Section 704 of Title VII, Section 8(a)(3) of the NLRA illustrates federal antiretaliation laws intended to confer upon American workers generally broad rights and privileges vis-a-vis their employers.

We refer to the third type of whistleblower protection provision as a "true" whistleblower statute, in the sense that it is actually designed to protect employees who "blow the whistle" on allegedly lawbreaking employers. Section 8(a)(4) of the NLRA, in contrast with Section 8(a)(3), illustrates this type of provision. Section 8(a)(4) (the ancestor of all the whistleblower protection provisions to be consolidated in S.2095) makes it illegal to "discriminate against an employee because he has filed charges or given testimony under this Act." 29 U.S.C. § 158(a)(4). Section 8(a)(4) thus protects any "employee who participates in a Board investigation" and thereby seeks "to prevent the Board's channels of information from being dried up .

. . ." NLRB v. Scrivener, 405 U.S. 117, 122-23 (1972). Similarly, the "participation clause" of Section 704 of Title VII (see fn. 1 supra), in contrast with the "opposition clause" of Section 704, is focused directly upon employees who assist in a federal agency's enforcement of the law against their employer. Hence, both of these "true" whistleblower protection provisions were conceived by Congress as serving a purpose wholly distinct from that served by the broader "employee privileges" provisions in the same statutes and in no sense do they create a license for confrontation or insubordination by employees. In S.2095, Section 4(a)(2) clearly creates true whistleblower protection.

Section 210, the existing antiretaliation statute applicable to nuclear industry employees, exemplifies a "true" whistleblower provision. Like Section 8(a)(4) of the NLRA, Section 210 has been described as protecting the Nuclear Regulatory Commission's "channels of information." Deford v. Secretary of Labor, 700 F.2d 281, 286 (6th Cir. 1983) quoting NLRB v. Scrivener, 405 U.S. 117, 122 (1972). More generally, the legislative history of Section 210 shows that Congress intended "to protect any worker who is discriminated against by his employer for providing assistance to NRC in the discharge of its regulatory responsibilities".[2] As three Justices of the Supreme Court described Section 210, its purpose is to "protect[] employees of nuclear facilities against retaliation by their employers *for offering assistance to the Nuclear Regulatory Commission in carrying out its responsibilities* under the Atomic Energy Act of 1954." *Kansas Gas & Electric Company v. Brock*, 106 S.Ct. 331, 3322 (1986) (White, Blackmun, and O'Connor, JJ., dissenting from denial of certiorari) (emphasis added).

---

[2] 124 Cong. Rec. 29, 769 (1978) (remarks of Senator McClure) (emphasis added); See also H. Rep. No. 95-11796, 95th Cong., 2nd Sess. 16-17 (1978): Section 210 intended "to provide protection to employees . . . from discharge or discrimination for taking part or assisting in administrative or legal proceedings of the Commission."

In these lights, Section 210 was designed to be a "true" whistleblower provision and thus to protect those who assist the responsible federal agency "in carrying out it responsibilities." *Id*. It is not designed to expand employees' prerogatives vis-a-vis their employers or to create a license for insubordination, as are the "opposition clause" of Section 704 of Title VII and Section 8(a)(3) of the NLRA. The Fifth Circuit Court of Appeals found this latter distinction particularly salient in interpreting Section 210 which, the court emphasized, "is not designed to modify the employee-employer relationship . . . ." *Brown & Root, Inc. v. Donovan*, 747 F.2d 1029, 1035 (5th Cir. 1984); *see id*.: "The purpose of the Energy Reorganization Act is 'not [to] restructure the employee-employer relationship.'"

But however one reads Section 210,[3] it is clear that Section 4(a)(1) of S.2095 would create quite different, and broader,

---

3/ There is presently a clear conflict among the Circuits. Both *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984) and *Kansas Gas & Electric v. Brock*, 780 F.2d 1505 (10th Cir. 1985), *cert. denied* 106 S.Ct. 3311 (1986) are contrary to *Brown & Root v. Donovan*.

protection for nuclear industry employees than would be afforded by a statute limited to true whistleblower protection. As we show in the following subsection, the provision of such protection would be peculiarly inappropriate in the nuclear industry and could substantially undermine public safety.

2. The proposed expansion of nuclear industry employees' prerogatives vis-a-vis their employers, on all matters relating to safety, will subvert nuclear safety by making jobsite discipline virtually impossible.

There are several extraordinary background factors that contribute to the unique context in which whistleblower allegations in the nuclear energy industry arise. First, it must be born in mind that the nuclear industry is the subject of what almost certainly is the most complex and the most comprehensive regulatory scheme in the history of government. Second, because of the nature of the industry and the regulatory scheme to which it is subject, the vast majority of the employees working at a nuclear plant or a nuclear construction site are occupied in jobs that at least indirectly are concerned with nuclear safety. This is particularly so with respect to Quality Control/Quality Assurance inspectors. For all such inspectors, and several other plant site employees, the monitoring of safety is the sum and substance of their jobs; this cannot be said of the great bulk of employees in any of the other industries to which S.2095 would apply, for whom safety issues are tangential aspects of their job duties. Third, the issue of nuclear energy has come to be highly political, and the nuclear industry must contend at every turn with a peculiar camp following of individuals and groups opposed to the industry's very existence and committed to preventing the construction, licensing and operation of nuclear power facilities. Whether these three factors be regarded as good or bad, they in any event give rise to circumstances in one of the contexts in which S.2095 would be applied that appear to be unique to the entire domain of labor and employment law in general, and that require careful consideration in the drafting of any legislation that will affect employment relationships at the plant site.

a. Because most nuclear industry employees engage in safety-related work most of the time, affording protection to in-house "disclosures" will immunize unsatisfactory performance from legitimate correction or discipline.

Since a very large number of employees at any nuclear reactor site have jobs that are in some way inherently concerned with the monitoring of nuclear safety, the protection that Section 4(a)(1) would provide would create some inherent conceptual problems that one rarely encounters in other areas of employment law. Since virtually any adverse employment action will unavoidably occur in close temporal proximity to some discussion or action bearing on safety issues, the requirements for a prima facie showing of unlawful discrimination in such cases arguably could be met by most employees on the job site on any given day. This is the case because, under Department of Labor precedent, a whistleblower's prima facie case requires only a showing that (1) the employee engaged in a protected act (as, under S.2095, most nuclear industry employees do most every day); (2) the employer was aware of the protected act (which is true by definition where the employee's protected act is the "disclosure" of a safety-related issue to his or her supervisor(s)); and (3) an adverse action was subsequently taken by the employer. See Priest v. Baldwin Associates, Case No. 84-ERA-30, Final Decision and Order of the Secretary (June 11, 1986). Hence, most employees, on most days, will be given by Section 4(a)(1) a more than plausible basis for suing their employer any time the employer takes any adverse employment action.[4]

But the problem goes well beyond a ready-made prima facie lawsuit for disgruntled employees. Under the Secretary's scheme for allocating the burden of proof in a whistleblower case, a

---

[4] The Fidell Report acknowledges that "expansion of whistleblower protections to persons in highly sensitive positions might make it too difficult to remove an incompetent or malicious employee." Cong. Rec. (Daily Ed. Feb. 23, 1988) at S. 1453. The essence of the problems that would be created in the nuclear industry by Section 4(a)(1) of S.2095 could be stated in these same terms, since the majority of employees at a site are at least arguably in "highly sensitive positions," as NRC regulations recognize.

One area in which problems analogous to those that would be created in the nuclear industry by S.2095 is the application of the protections under § 704 of Title VII to Equal Employment Opportunity compliance officers. See, e.g., Pendleton v. Rumsfeld, 628 F.2d 102 (D.C. Cir. 1980); Smith v. Singer Co., 650 F.2d 214 (9th Cir. 1981); Rosser v. Laborers' Local 438, 616 F.2d 221 (5th Cir.) cert. denied, 449 U.S. 886 1980; Watley v. Metropolitan Atlanta Rapid

(Footnote 4 continued on next page)

complainant's satisfaction of the requirements for a prima facie case works to shift, to the respondent, the burden of proving that it did not discriminate. See Dunham v. Brock, 794 F.2d 1035, 1039-40 n.2 (5th Cir. 1986). Hence for all inspectors and most other nuclear employees, S.2095 not only provides a mechanism for suing the employer any time the employer disciplines, chastises, or otherwise displeases the employee, but it does so in such a way that the employer will, in effect, be presumed guilty.

But S.2095 goes further still. It provides that immediate reinstatement and mandatory compensatory and punitive damages must be ordered where, in the initial investigation, it appears only that "there is reasonable cause to believe a violation of this Act has occurred." Sections 5(b)(1), 5(g). And these orders will not be stayed pending further proceedings before the Secretary. Section 5(c)(1). Hence if, as seems not unlikely, a finding of "reasonable cause" equates with a prima facie case, most any time a nuclear industry employee is displeased with his supervisor's adverse treatment of him, that employee can promptly obtain automatic compensatory and punitive damages and, if he has been discharged, immediate reinstatement. This is not a "parade

---

(Footnote 4 continued from previous page)
Transit, 632 F.2d 1325 (5th Cir. 1980). In all of these cases, the courts struggled with the fact that the employees' very job was to "oppose" unlawful employment actions. In each case, however, the courts realized the inevitable conclusion that an employer must be free to discipline or discharge even such an employee where that employee performs in a disloyal or incompetent manner.

of horribles" predicated upon implausible factual assumptions: it is a plain statement of the necessary effect of the language of S.2095 within the legal and factual context it will operate in. A more effective insurance policy against legitimate discipline could not be written.

And it is difficult to imagine an industry in which the proper discipline of negligent or nonperforming employees is more important to public health and safety than the nuclear industry. While we know that alarmist portraits of the hazards associated with civilian nuclear power production often grow not from a knowledge of the facts, but from an understandable if misdirected reaction to the horror of thermonuclear war, we are also keenly and deeply aware of the importance of maintaining the very highest performance standards at a nuclear facility. Careless employees can, in other words, present very real and very serious dangers.

And of no one is this truer than of those many persons employed by a utility or contractor at a plant for the specific purpose of performing inspection work. Yet it is these very same persons that S.2095 would most effectively insulate from discipline. If a safety inspector is careless, or lazy, or inattentive, public health and safety demand that that inspector be disciplined or, if discipline does not prove effective, discharged. But if this happens, S.2095 would virtually guarantee that that same incompetent inspector will be back on the job in no time, waiving his punitive damage award in the face of: 1) the supervisors who would like to be able to demand competent and conscientious inspection work, and 2) all the other inspectors at the site, who will now have been given the unmistakable message that the supervisors are powerless to do so.

b. Thus, the fundamental assumptions underlying S.2095 are misconceived in the context of the nuclear industry.

The assumption underlying all whistleblower legislation is that there are employees in industries affecting health and safety who have genuine and sincere concerns about the health and safety of themselves and others and who are at risk of being mistreated by their employers for voicing those concerns. We have no reason to doubt the truth of this assumption. What the legislation overlooks is the fact that there are also, in any industry, malcontented, poor performers who would prefer to use litigation to obtain job security than to work in a conscientious and responsible way. As Mr. Fidell stated in his report, upon which the Administrative Conference recommendation is based, whistleblower legislation must be "so managed as to offer no reason for malcontents or marginal performers to see it as an insurance policy against proper discipline." Cong. Rec. (Daily Ed. Feb. 23, 1988) at S. 1453. But in the nuclear industry, as shown, S.2095 would offer most such employees every reason to do so.

Thus also is belied the assumption underlying S.2095 that whistleblower protection should be provided alike in all industries. The nuclear power industry is like no other. It is the day-to-day job of many, if not most, employees at a nuclear power site to "disclose" matters that at least indirectly implicate safety issues. Under section 4(a)(1) of S.2095, such employees would be constantly engaged in protected activity every day. Hence under S.2095 they could not be disciplined for performing their safety-reporting functions incompetently or negligently since any such discipline is more than likely to lead to a lawsuit in which the deck is heavily stacked in the employee's favor. We know that this is not in the national interest, and we cannot believe that this is a goal Congress would embrace.

B. The Bill's Anti-preemptive Provision Will Necessarily Result In Undesirable Interference With Federal Regulatory Priorities.

Although ACUS Recommendation 87-2 "does not take a position on whether federal statutes do or should preempt state law" in the area of whistleblower protection, see Cong. Rec. (Daily ed.) at S. 1451 (Feb. 23, 1988), Section 8(a) of S.2095 would expressly disavow federal preemption and thus adopt the Fidell Report's recommendation that the states be left free to "experiment" with similar legislation. Id. at S. 1457. Mr. Fidell's recommendation on this point is not at all easy to square with his stated objective in proposing new federal legislation -- to provide "uniform treatment of health and safety whistleblowers." Id. at S. 1451 (emphasis added); see also id. at S. 1448 (the purpose of S.2095 is "[to] bring order to the current confusing pattern of laws . . . .") (remarks of Senator Metzenbaum). Quite apart from this apparent incongruity of ends and means, however, the need for uniform national regulation of the nuclear industry is and has always been a clear federal priority, with which the anti-preemptive provision in Section 8(a) would directly conflict. And this is no less true in the area of whistleblower protection since, as shown in the preceding section, such protections must be carefully tailored to account for the unique character of the nuclear industry.

The history and nature of the federal scheme for regulating nuclear power generation are unique. While the federal and state governments have for many years policed power production in this country, federal control of nuclear power production is sui generis, as the Supreme Court observed:

> The Atomic Energy Act must be read, however, against another background. Enrico Fermi demonstrated the first nuclear reactor in 1942, and Congress authorized civilian application of atomic power in 1946, Atomic Energy Act of 1946, see Act of Aug. 1946, 60 Stat. 755, at which time the Atomic Energy Commission (AEC) was created. Until 1954, however, the use, control, and ownership of nuclear technology remained a federal monopoly. The Atomic Energy Act of 1954, Act U.S.C. § 2011 et. seq. (1976 ed. and Supp. V), grew out of Congress' determination that the Government encouraged the private sector to become involved in the development of atomic energy for peaceful purposes under a program of federal regulation and licensing. See H.R. Rep. No. 2181, 83d Cong., 2d Sess., 1-11 (1954). The Act implemented this policy decision by providing for licensing of private

> construction, ownership, and operation of commercial nuclear power reactors. Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S., at 63. The AEC, however, was given exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession, and use of nuclear materials, 42 U.S.C. §§ 2014(e), (z), (aa), 2061-2064, 2071-2078, 2091-2099, 2111-2114 (1976 ed. and supp. V). Upon these subjects, no role was left for the States.

Pacific Gas & Electric Co. v. Energy Resources Commission, 461 U.S. 190, 206-7 (1983).

At the same time that it ended the complete "federal monopoly" on nuclear technology, Congress erected comprehensive regulatory machinery to see to it that private nuclear facilities would be as safe as technologically and economically feasible. It did so by creating the most detailed and comprehensive regulatory scheme ever devised for an industry. As the Court of Appeals for the Fifth Circuit recently stated:

> . . . Congress has laid down, or caused to be laid down, more refined and express regulations concerning the nuclear industry than any other industry in the nation . . . .

Brown & Root, Inc. v. Donovan, 747 F.2d 1029, 1035 (5th Cir. 1984). Nuclear whistleblower protection (such as is now provided by Section 210 of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. § 5851) is an integral part of this regulatory scheme, since it is designed to protect employees who "offer[] assistance to the Nuclear Regulatory Commission in carrying out its responsibilities under the Atomic Energy Act . . . ." Kansas Gas & Electric Company v. Brock, ___ U.S. ___, ___, 106 S.Ct.

331, 3312 (1986) (White, O'Connor, and Blackmun, JJ., dissenting from denial of certiorari). The preemptive scope of federal nuclear whistleblower protection must therefore be crafted with due regard for this unique historical and regulatory context. First, nuclear production and safety simply are not "areas traditionally of concern to the states" (Fidell Report at 44); on the contrary, it is a subject over which the federal government has traditionally exercised complete and exclusive control. Second, in an industry whose development Congress has identified as a federal priority that "must be regulated in the national interest and in order to provide for the common defense and security . . . ," 42 U.S.C. § 2012(d) (emphasis added), state and local regulatory "experimentation" is peculiarly inappropriate. Third, and most specifically, state remedies that supplement those provided by federal law can only upset the balance Congress would seek to maintain between industrial development and regulation. As the Fifth Circuit stated:

> The fact that Congress has produced so many detailed provisions governing the nuclear industry indicates the legislature may well have attempted to approach the line where it believed the added costs of regulation exceeded benefits . . . . If this is so, for a court to interpret the statute to authorize "more in the same vein" will result in regulation where costs exceed benefits, upsetting the balance intended by Congress.

Brown & Root v. Donovan, 7476 F.2d at 1035. See also County of Suffolk v. Long Island Lighting Co., 728 F.2d 52, 60 (2d Cir.

1984); Northern States Power Company v. Minnesota, 447 F.2d 1143, 1153-54 (8th Cir. 1971), aff'd, 405 U.S. 1035 (1972).

Hence, while the States' freedom to experiment with wrongful discharge remedies may be, in some contexts, a valuable asset of our federal system, important federal interests will be compromised if we welcome such State action in all contexts. This is particularly so in the nuclear arena where, as more than one federal district court has recognized, the uniquely pervasive federal regulatory scheme does not permit concurrent state regulation of whistleblower complaints.[5] This is, we believe, clearly the correct view. In an industry as completely and critically regulated as the nuclear industry, it makes little sense for Congress to take such great effort carefully to design a regulatory scheme that balances competing national policies and then to give local authorities license to tamper with the scheme and upset the balance it is designed to maintain. As we showed in Section A above, overprotection such as that proposed in S. 2095 could substantially undermine public health and safety, and this would be no less the case should such laws be adopted and enforced by the States rather than by the federal government.

5/ Snow v. Bechtel Construction Co., 647 F.Supp. 1514, 1517-19 (C.D. Cal. 1986). Another reported federal decision on this issue is in conflict with Snow. Stokes v. Bechtel, 614 F.Supp. 732 (N.D. Cal. 1985). The Stokes opinion (repudiated in Snow) held that Section 210 is not preemptive since it is drafted in permissive terms and does not compel an aggrieved employee to file suit. See also Herrman v. H.P. Foley, No. 85-2246 RG (C.D. Cal., May 20, 1985) (Section 210 preempts state remedies).

III. THE BILL'S PROCEDURAL AND REMEDIAL SCHEME IS INHERENTLY UNWORKABLE, IMMODERATE AND UNFAIR

In several important respects the procedural and remedial scheme of S.2095 represents bad policy. First, mandatory punitive damages flies directly in the face of current nationwide efforts to limit the abuses that punitive damage awards lead to, and will inevitably inspire the filing of unfounded lawsuits. Second, the litigation procedures contemplated by S.2095 are unrealistic and indefensibly chaotic. Finally, the damages provisions of S.2095, coupled with the Bill's refutation of the policies underlying preemption, _res judicata_, and election of remedies, result in exposing employers to double, triple, and quadruple jeopardy in a way that cannot be rationally defended either on grounds of basic fairness or on grounds of the efficient administration of judicial resources.

A. The Provision Of Mandatory Punitive Damages Ignores Current Judicial Problems And Will Lead To Abusive Litigation.

Punitive damages have in recent years been the object of a storm of criticism in the United States and have been blamed as one of the main inducements for frivolous lawsuits. _See_, _e.g._, Note, _The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages_, 41 N.Y.U. L. Rev. 1158 (1966); Sales & Cole, _Punitive Damages: A Relic That Has Outlived Its Origins_, 37 Vand. L. Rev. 1117 (1984); Bell & Pearce, _Punitive_

Damages and The Tort System, 22 U. Rich. L. Rev. 1 (1987); Ellis, Fairness and Efficiency in the Law of Punitive Damages, 56 S. Cal. L. Rev. 1 (1982); Owen, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, 49 U. Chic. L. Rev. 1 (1982); Owen, Civil Punishment and the Public Good, 56 S. Cal. L. Rev. 103 (1982); Schwartz, Deterrence and Punishment in the Common Law of Punitive Damages: A Comment, 56 S. Cal. L. Rev. 133 (1982); Attorney General Comm., Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability (Feb. 1986). The American College of Trial Lawyers Task Force on Litigation has recently issued a report disclosing unanimous agreement that punitive damage awards are one of the greatest problems in our legal system. American College of Trial Lawyers, Report of the Task Force on Litigation Issues 5 (1986). In large numbers, the states are enacting legislation limiting, or abolishing, punitive damage awards, Bell & Pearce, supra, at pp. 15-17, and the creation of limits on the availability of punitive damages has been the subject of several federal legislative initiatives. See, e.g., S. Rep. No. 476, 98th Cong., 2d Sess. 58-62 (1984); S. 2046, 99th Cong., 2d Sess. § 3; H.R. 4460, 99th Cong., 2d Sess. § 207 (1986); S. 2441, 99th Cong., 2d Sess § 7 (1986).

The several policy arguments that support the abolition or restriction of punitive damage awards are canvassed in the materials cited and need not be rehearsed here. What does require emphasis in the context of S.2095 is the truly extraordinary and unjustified vindictiveness of *mandatory* punitive damages in a statute whose procedural provisions align the Secretary with the complainant and against the respondent. The unfairness of this scheme is put in sharp focus by the realization that civil punitive damages are, in purpose and effect, tantamount to the imposition of criminal penalties. *See Restatement (Second) of Torts*, § 908 comment a (1979); Freifield, *The Rationale for Punitive Damages*, 1 Ohio St. C. J. 5, 7-9 (1935); 1 W. LaFave & A. Scott, *Substantive Criminal Law*, § 1.3(a) at p. 16 (1986); Note, *The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment*, 85 Mich. L. Rev. 1699 (1987). This being so, there is an emerging concern among judges and legal scholars alike that a defendant facing the imposition of punitive damages may well be constitutionally entitled to the procedural and substantive protections accorded the criminally accused. *See* K. Redden, *Punitive Damages* §§ 2.4(A), 7.2(A)(6) (1980); Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. 517, 524 (1957); Friendly, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. Chic. L. Rev. 408, 412-35 (1967); Sales & Cole, Punitive Damages, *A Relic That Has Outlived Its Origins*, 37 Vand. L. Rev. 1117, 1159 & n.189 (1984); Grass, *The Penal Dimensions of Punitive Damages*, 12 Hastings Const. L. Q. 241, 307 (1985); *In Re School Asbestos Litigation*, 789 F.2d 996, 1004 (3d Cir. 1986); *Wilmington v. J. I. Case Co.*, 793 F.2d 909, 922 n.10 (8th Cir.

1986); Womack v. Gettelfinger, 808 F.2d 446, 451-52 (6th Cir. 1986).

But S.2095 provides a respondent no such protections. The informality of administrative pleadings can deny a respondent adequate and timely knowledge of the charges against it. Hearsay evidence is typically admitted without regard for the respondent's right to confront adverse witnesses. Far from requiring proof of guilt beyond a reasonable doubt, Section 5(b)(1) requires the imposition of punitive damages (after an investigation) where there is merely "reasonable cause to believe" that discrimination has occurred, and the burden of proof allocation scheme adopted by the Secretary for hearings usually puts on the respondent the burden of proving that it did not discriminate. See Dunham v. Brock, 794 F.2d 1037, 1039-40 n.2 (5th Cir. 1986) (Secretary adopts scheme whereby respondent carries the burden of disproving a violation if complainant establishes a prima facie case). And, as will be noted below, our society's two greatest protections against the arbitrary imposition of criminal penalties -- trial by jury and an institutionally impartial judge -- are completely denied a respondent under S. 2095.

In sum, the damages provisions of S.2095 are strikingly regressive. At a time when the nation's judicial systems are being criticized for inspiring frivolous litigation though seemingly arbitrary awards of punitive damages, S.2095 achieves wholly unprecedented levels of arbitrariness by mandating the imposition of punitive damages willy-nilly, irrespective of the degree of respondent's fault. At a time when lawyers, judges, and legal scholars advocate that protections for the criminally accused should be afforded a punitive damage defendant, S.2095 seeks to impose punitive fines on respondents within a procedure in which several of the most rudimentary such protections are denied. It is difficult to conclude otherwise than that while the Bill was born of a desire to foster support for law and to protect the law-abiding, it has in fact evolved into a vindictive measure that has itself little regard for the most basic laws of moderation and fair play.

B. The Procedure Created By S.2095 Is Chaotic And Ill-considered, And The Provision Of Double And Triple Jeopardy For Employers Is Unjustified And Patently Unfair.

Nothing demonstrates the Bill's lack of reasonable constraints more clearly than its provisions dealing with collateral proceedings. Other agencies are not only left free under Section 8(c-d) to impose their own fines and penalties for acts already penalized by the Secretary, but under the provisions of Section 7, they are effectively encouraged to do so. And, according to the plain language of Section 8(a), a complainant is free not only to institute collateral state proceedings against respondent but to prosecute such an action unrestrained by the basic rules of res judicata and election of remedies. On top of all this, a complainant who is dissatisfied with the progress of his case before the Department of Labor is free to start all over again in federal district court. In what has to be an unprecedented achievement, S.2095 would thus create procedural pandemonium and expose a respondent to quadruple jeopardy.

1. The procedures of S.2095: A Horror Story

A proceeding arising in the nuclear industry will illustrate the procedural nightmare that S.2095 allows for. Assume that an employee named Smith at a nuclear power plant is discharged for insubordination after disrupting a meeting of inspectors and then defiantly swearing at his supervisors, and daring them to fire him, during a counselling session that follows the inspectors' meeting. See Dunham v. Brock, 794 F.2d 1037 (5th Cir. 1986). Under S.2095 the following bizarre proceedings are more than possible:

1. Smith files suit under S.2095 claiming that he disturbed the meeting in order to "disclose" safety problems (see Section 4(a)(1)) and that his discharge was therefore unlawful. He demands $2 million in punitive damages. Inevitably, the local press takes an active interest. Following an investigation pursuant to Section 5(b), the investigator concludes that Smith was properly counselled and then discharged for disrupting safety-related inspection work. Smith decides to file a request for hearing under Section 5(c)(1). His attorneys note, however, that under the language of Section 5(c)(1) (which makes the

investigative determination "the final order of the Secretary, subject to judicial review pursuant to subsection (i)" if a request for hearing is not filed) Smith can completely bypass the Secretary and go straight to the Court of Appeals. They think doing so might be amusing, since the Court of Appeals would then have to try to review a decision for which there is no record of any kind, but they decide instead to pursue an administrative hearing, hoping that they will be able to persuade the Secretary to intervene on Smith's behalf pursuant to Section 5(c)(2).

2. After Smith's request is filed and discovery had by both parties, a hearing is held under Section 5(c) before the Secretary's Office of Administrative Law Judges. See 29 CFR Parts 18, 24. The Secretary decides not to intervene. The presiding administrative law judge issues a decision finding that, although his conduct at the meeting was protected, Smith was properly discharged for insubordination. Smith appeals to the Secretary in order to challenge the ALJ's decision.

3. Meanwhile, Smith files a suit in State court alleging that his discharge violated state public policy, and requesting millions in punitive damages. Under Section 8(a), the State court suit is not preempted and Smith is free to proceed, even though the State action precisely duplicates Smith's suit under S.2095.

4. In resolving Smith's appeal, the Secretary's Office of Administrative Appeals allows the 60-day deadline in Section

7(f)(2) to pass. Pursuant to Section 7(h)(1), the Secretary notifies Smith of his right to initiate suit in federal court.

5. Smith files suit in federal district court, again seeking millions in punitive damages. The respondent is now defending identical lawsuits in the Department of Labor, in State court, and in federal district court.

6. The DOL Office of Administrative Appeals issues a final order affirming the decision of the administrative law judge. Pursuant to Section 7(a), the Secretary forwards a copy of the final order to the Nuclear Regulatory Commission. Under that same section, the NRC deems itself compelled to "take appropriate action." On the basis of Section 7(c), which provides that "[n]othing in this section limits the authority of any federal agency under any other law," and in response to widespread media attention, the NRC initiates an investigation to determine whether in discharging Smith respondent violated 10 C.F.R. § 50.7, whose provisions duplicate the punitive aspects of S.2095.

7. Pursuant to Section 5(i), Smith appeals the Secretary's decision to the appropriate United States Court of Appeals. While defending this appeal, respondent is also involved in the NRC investigation, and is preparing for trial in both the State court and federal district court actions, all of which are based on allegations identical to those that the Secretary has rejected.

8. Respondent persuades the federal district court to stay its proceedings pending resolution of Smith's appeal from the Secretary's decision. In that appeal, however, a divided Court of Appeals decides that the expiration of the 60-day appeal deadline under Section 5(f)(2), and Smith's initiation of the federal district action under Section 5(h)(1), divested the Secretary of jurisdiction. Hence, the Court holds, the Secretary's subsequently issued final order is nullity and Smith's appeal must be dismissed. The dissenting opinion points out that, under Section 5(f)(2), the decision of the administrative law judge automatically became the final order of the Secretary when the 60 day appeal period elapsed. The dissent thus concludes that even if the Secretary's order is a nullity the Court of Appeals does have before it a final order that is subject to appeal, and goes on to state that the ALJ's decision is clearly correct and that irresponsible people like Smith should not be allowed to work at a nuclear power plant. The majority opinion concedes that Sections 5(f)(1) and 5(h)(1) are flatly inconsistent, but justifies its reading of S.2095 on the grounds that it would limit the number of possible simultaneous proceedings to three, whereas the dissent's reading would permit simultaneous proceedings, after a final order of the Secretary by operation of Section 5(f)(1), in State court, in federal district court, in the U.S. Court of Appeals, and before the NRC.

9. The federal district court lifts its stay in response to the Court of Appeals ruling, and Smith's attorneys press on for

trial, on the same claims, both in federal court and in State court. On the basis of Section 8(a), the state court denies respondent's motion to dismiss on grounds of preemption.

10. Learning that the Court of Appeals has ruled that the Secretary's final order was a nullity, the NRC discontinues the investigation initiated upon the Secretary's Section 7(a) referral. When learning of this action, however, Smith's attorneys file with the NRC a "Request for Action" under 10 C.F.R. § 2.206, in response to which the investigation under 10 C.F.R. § 50.7 is recommenced.

11. All on the same day, the NRC takes enforcement action on Smith's discharge against the licensee and trial begins in both the State court and the federal district court on Smith's wrongful discharge claim. Hence, although Smith's allegations were dismissed both by the administrative law judge and by the Secretary, after a full trial, those same claims are now being processed, again, in three different fora.

12. The federal district court judge rules in respondent's favor, dismissing Smith's allegations. As did the administrative law judge, the Secretary and the dissenting judge in the Court of Appeals, the district court judge notes that disruptive and insubordinate employees at a nuclear power plant pose a very substantial safety risk to the public.

13. In Smith's State court action, respondent argues that the Department of Labor determination and the federal district court judgment, both of which resolved the identical claim

against Smith after a full trial, are res judicata on Smith's State court claim. The State court judge, impressed by respondent's argument, concludes nonetheless that such a ruling is foreclosed by Section 8(a) of S.2095, which mandates that "remedies provided to employees by this Act" may not be construed as "intended to alter or effect" "any other rights and remedies of the employees provided under State law." On the basis of this plain language, the State court rules, it is precluded from according any proceeding conducted under S.2095 res judicata effect. Despite the merits of the case, the State court jury awards Smith $5,000 in compensatory damages and $5 million in punitive damages.

14. The media has a field day with Smith's $5,005,000 award, publishing lurid tales of administrative and industrial conspiracies based in large part on the fact that the Secretary did not intervene in Smith's Department of Labor proceeding. Several members of Congress, with the rumored backing of the President, contact the regional headquarters of the NRC to express their "strong interest" in seeing the Commission "do justice" in the "Smith affair." Smith's attorneys, now joined by several "public interest" groups, petition the NRC to revoke respondent's operating license for the facility Smith worked at. If the NRC does so (it has the authority under 10 C.F.R. 50.7 and 10 C.F.R. 2.202), twelve hundred people will be put out of work, a $4.2 billion investment will be idled, and three mothballed power plants fired by imported oil will be reactivated.

2. The multiple jeopardy created by S.2095 raises serious constitutional problems.

As former Attorney General Griffen Bell has noted, the imposition of punitive damages raises serious "double jeopardy" issues where the defendant is also subject to regulatory fines.

> Some commentators charge that the award of punitive damages violates the rule against double jeopardy by imposing a double punishment for the same crime. This criticism arises from the situation where the defendant can be assessed punitive damages in a civil action for the same acts for which he can be fined in a criminal action. . . .

Bell & Pearce, Punitive Damages and the Tort System, 22 U. Rich. L. Rev. 1, 5 (1987) (footnote omitted). See also, Sales & Cole, supra, 37 Vand. L. Rev. at 1159 n.189; Walther & Plein, Punitive Damages: A Critical Analysis: Kink v. Combs, 49 Marq. L. Rev. 369, 384 (1965). By operation of Sections 7 and 8, however, S.2095 makes the issues that concern these writers seem pale. A respondent is subject to punitive fines for the same act in at least three different fora. And by operation of the "private action" provision in Section 5(f), a complainant can jettison his DoL case and start anew in federal court -- provided only that the Secretary fail to comply with time deadlines that are, if past experience is any guide, unrealistic to begin with. And even if the complainant's claim is rejected as baseless by DoL, by a federal court, and by the federal agency responsible for respondent's industry, the complainant is free, under Section 8(a), to file another lawsuit in a state court that will be precluded from applying those rules of res judicata and election of remedies that would place reasonable limits on any other plaintiff's rights to multiply suits vexatiously.

It is therefore quite possible that S.2095, by creating a situation in which a respondent is subject to multiple punitive fines for the same act, even where that very act has previously been judged lawful, violates the double jeopardy and excessive fines clauses of the Eighth Amendment. It is perhaps more meaningful, however, to note the importance that the concepts embodied in these clauses have had in our political and judicial traditions. The Excessive Fines clause, for example, originated in Section 20 of the Magna Carta of 1215.[6] See W. McKechnie, Magna Carta, at 284-93 (2d ed. 1914). This same principle was restated, in response to James II's abuses of the courts, in the English Bill of Rights of 1689, which provided in part that "excessive bail ought not to be required, nor excessive fines imposed . . . ." 1 Wm. & Mary, Sess. 2, Ch. 2 (1689), reprinted in R. Perry & J. Cooper, Sources of Our Liberties, at p. 247 (1959). Thomas Jefferson incorporated this same language in Section 9 of the Virginia Declaration of Rights of 1776. See Solem v. Helm, 463 U.S. 277, 285-86 & n.10 (1983); Perry & Cooper, supra, at pp. 311-12, 423. The Eighth Amendment to the

---

6/ Section 20 provided that "[a] freeman shall not be amerced for a slight offense, except in accordance with the degree of the offence; and for a grave offence he shall be amerced in accordance with the gravity of the offence . . . ." Translated in McKechnie, supra, at p. 284.

U.S. Constitution was adopted verbatim from Section 9 of Jefferson's Virginia Declaration. Id.

Throughout most of its 773-year history, the prohibition against excessive "amercements," or fines, has been viewed as among a free peoples' main protections against government abuse in both civil and criminal proceedings. See, generally, Note, supra, 85 Mich. L. Rev. 1699. Nor can it be seriously doubted that S.2095, which provides that multiple judicial and administrative penalties may be freely piled on top of its own mandatory punitive damages, grossly offends this prohibition and the traditions that embody it. S.2095 is an immoderate and unwise law.

IV. THE PROCEDURE CREATED FOR THE ADJUDICATION OF WHISTLEBLOWER CLAIMS DENIES LITIGANTS OUR SYSTEM'S THREE MAINSTAYS OF FAIR AND IMPARTIAL JUSTICE.

The procedure created by S.2095 for the adjudication of whistleblower claims is a composite of elements drawn from many sources, none of which is particularly novel. As an amalgam, however, the procedure is unprecedented, and rightly so. The availability in private actions of compensatory and punitive damages is nothing new, being historic features of the civil law courts; but entrusting the award of such damages to an appointed administrative judge of insecure tenure has rarely been attempted, and wherever attempted has been roundly condemned. So, too, scrutiny of facts and the rendition of verdicts has been performed by judicial and administrative officers in a host of circumstances; but never in a suit for damages by one private person against another. Here, as the seventh amendment provides, factfinding has always been the province of the jury. And finally, it is common enough in our federal agencies for an arm of an agency to lift the sword of the advocate or prosecutor on behalf of the public interest. But never has this been thought proper where that same arm holds the scales of justice and acts, not on behalf of the public, but on behalf of one private party and against another. In each of these three regards the proposed procedure strays outside our tradition's most honored bulwarks of judicial integrity and in so doing strips the parties of the basic guarantees of fairness to which our citizens have historically been entitled.

A. S.2095 Violates the Seventh Amendment By Denying Private Litigants Their Right to Trial By Jury.

Unlike several types of cases for which Congress has prescribed administrative adjudication, the suits authorized by S.2095 are "private" actions. Under Section 5(c)(1), the Department of Labor does not prosecute a respondent on behalf of the state, but instead plays the role of judge and jury. Even where, under Section 5(c)(2), the Secretary intervenes on behalf of the complainant, the suit remains one essentially between the private parties, since the Secretary (as intervenor) is powerless to settle or otherwise terminate the proceeding without the complainant's consent. Section 5(j). This fact raises a substantial question as to whether the procedure created by S.2095 violates the constitutional guarantee of trial by jury.

The Seventh Amendment guarantee of trial by jury extends to all legal, as opposed to equitable, actions. Parsons v. Bedford, 28 U.S. 433, 446-47 (1830). Where both legal and equitable relief is sought, the right to jury trial controls and cannot be compromised by prior adjudication of equitable claims. Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510-11 (1959). The availability of compensatory and punitive damages under S.2095 makes the Seventh Amendment applicable, since such damages are the hallmark of a "legal" action within the Amendment's meaning. Curtis v. Leother, 415 U.S. 189, 194 (1974).

The only situation where non-jury administrative factfinding is allowed in a case at law is where the case involves "public rights." Muray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 284 (1855). As the Supreme Court has summarized its jurisprudence: "Our prior cases support administrative factfinding in only those situations involving "public rights," e.g, where the government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights. Wholly private tort, contract, and property cases, as well as a vast range of other cases, are not at all implicated." Atlas Roofing co., Inc. v. Occupational Safety and Health Review Commission, 430 U.S. 442, 458 (1977). A case under S.2095 is not a "public rights" case. It lies between private parties, not "between the government and others." Ex Parte Bakelite Corp., 379 U.S. 438, 451 (1928). A "public rights" case is one which, by contrast, arises "between the government and persons subject to its authority." Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 67-8 (1982).

Since S.2095 creates private rights, it is subject to the Seventh Amendment. Atlas Roofing, supra. Indeed, the Secretary of Labor has recognized this problem, and has taken the position that he should not award compensatory damages under Section 210, although doing so is made discretionary, see 42 U.S.C. § 5851(b)(2)(B), on the grounds that to do so would conflict with the Seventh Amendment right to trial by jury. Deford v. Secretary of Labor, 700 F.2d 281, 288 (6th Cir. 1983). S.2095 presents a far worse problem, of course, by making both compensatory and punitive damages mandatory. Thus, the Senate Committee on Commerce, Science and Transportation has questioned whether a statute that provides for the assessment of punitive damages without provision for trial by jury would not violate the defendant's rights under the Seventh Amendment. See, S. Rep. No. 476, 98th Cong., 2d Sess. at 101 (1984). S.2095 provides no justification for departing from the Secretary's current practice under Section 210.

B. S.2095 Also Violates The U.S. Constitution By Denying Private Litigants Their Right To An Article III Judge.

For the same reasons a suit under S.2095 is subject to the guarantee in Article III that federal adjudication of private suits be conducted by life-tenured judges. Northern Pipeline, supra; Ex Parte Bakelite, supra; Palmore v. U.S., 411 U.S. 389 (1973); Glidden v. Zdanok, 370 U.S. 530 (1962). The Supreme Court has recently spoken on this issue too: "Our precedents clearly establish that only controversies in the [public rights] category may be removed from Art. III courts and delegated to legislative courts or administrative agencies for their determination. Private-rights disputes, on the other hand, lie at the core of the historically recognized judicial power." Northern Pipeline, 458 U.S. at 70 (citations omitted) (emphasis original).[7]

7/ While the Supreme Court has, since the Northern Pipeline decision, stated that the public right/private right dichotomy is not "a bright-line test for determining the requirements of Article III," Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568, 586 (1985), the doctrine remains valid as reflecting "a pragmatic understanding" that "the danger of encroaching on the judicial powers is reduced in a public rights case." Id. at p. 589. And in the only private right case to receive Article III scrutiny by the Court since Northern Pipeline, administrative adjudication was found acceptable largely upon a basis clearly not present in S.2095. Commodity Futures Trading Commission v. Schor, ______ U.S. ______, ______; 106 S.Ct. 3245, 3260 (1986) (administrative adjudication of private rights acceptable where, inter alia, both parties have the option of proceeding instead before an Article III judge).

The procedure established by S.2095, which provides neither for trial by jury nor for adjudication by a tribunal constituted in accordance with the mandates of Art. III, thus appears to be unconstitutional. But beyond the question of the Bill's constitutionality, upon which able scholars might differ, we question whether the procedure created comports with basic fairness. And here it bears repeating that trial by jury and the independence of the federal judiciary are not hollow legalisms. The jury constitutes the conscience of the community, Duncan v. Lousiana, 391 U.S. 145, 155-56 (1968), and as such serves as an important guardian against the arbitrary exercise of power. Taylor v. Louisiana, 419 u.S. 522, 530 (1970). And its most essential place -- in the language of the initial draft of the Seventh Amendment -- is in actions "between man and man." It is here, the founders demanded, politics play no role.

So too, of course, the guaranteed independence of the federal judiciary, where political pressures ought have no sway. United States v. Will, 449 U.S. 200, 217-18 (1980); U.S. ex rel. Toth v. Quarles, 350 U.S. 11, 16 (1955); see generally The Federalist, No. 78 at pp. 546-48. While we in no way disparage the high integrity and commitment of the president's appointed agency heads, the fact remains that such persons are institutionally subject to political pressures and thus are, in our Framers' non-indulgent eyes, not the proper dispensers of private justice. But in S.2095, the Secretary of Labor is made to play this role, and without the intermediary protection of the jury. We believe this to be an unwise arrangement. Indeed, as we show in the following section, S.2095 does more than create the danger of partisanship the Framers sought to guard against, but it actually ordains that the Secretary discharge his judicial duties in a partisan manner.

C. S.2095 Violates The Fundamental Precept That A Party Cannot Fairly Judge His Own Cause.

In Section 5(c)(2) of the proposed Bill, the Secretary is given the unprecedented authority to intervene, on behalf of the complainant, in a hearing over which the Secretary's Office of Administrative Law Judges presides. The Section provides no mechanisms by which the respondent is to be protected from the unfairness of thus aligning the prosecution with the judge. Absent such protections, the procedure created by Section 5(c)(2) probably violates the Due Process clause and Section 554(d) of the Administrative Procedure Act, and unquestionably creates an unfair system.

Yet even in cases where the Secretary has not intervened, the Bill as drafted contemplates his playing a partisan, rather than properly disinterested, role. In Section 5(j), the Secretary is compelled to insert himself in any case the parties choose to settle in order to ensure that the settlement is, *inter alia*, "in the best interests of the complainant." Thus, the very same personnel who are to act as an impartial appellate tribunal under Section 5(f)(2) are compelled to exercise special solicitude for one of the parties to the action over which they preside. Here, too, the Bill offends the most rudimentary precepts of fair play.

It is not unheard of for one branch of an agency to prosecute a private party on behalf of the state while another branch of the same agency presides as judge. The Federal Trade Commission, Securities and Exchange Commission and Nuclear Regulatory Commission provide prominent examples. Indeed, even where the agency takes sides with one private party and against another, as in adjudications before the National Labor Relations Board, the creation of an Office like that of the General Counsel, with its strict separation from other agency personnel, is deemed adequate to ensure that adjudication is not tainted by partisanship. Thus, in each of these four agencies the prosecutorial function is clearly and institutionally walled off from those who sit in judgment, and where the agency takes sides as between private disputants, as does the NLRB, that wall is particularly high.

But wherever such a wall is either breached or wanting, Due Process is violated.

> The fundamental requirements of fairness in the performance of such functions require at least that one who participates in a case on behalf of any party, whether actively or merely formally by being on pleadings or briefs, take no part in the decision of that case . . . .

TransWorld Airlines v. Civil Aeronautics Board, 254 F.2d 90, 91 (D.C. Cir. 1958). Accord Amos Treat & Co. v. S.E.C., 306 F.2d

260, 262-64 (D.C. Cir. 1962) cited with apparent approval in Withrow v. Larkin, 421 U.S. 35, 49-50 n.16 (1975). Section 554(d) of the Administrative Procedure Act codifies this same principle, providing that the "employee who presides at the reception of evidence [i.e., the administrative law judge] . . . may not . . . (2) be responsible to or subject to the supervision or direction of an employee engaged in the performance of investigative or prosecuting functions for an agency." 5 U.S.C. § 554(d).

Existing procedures in the Department of Labor, under which the Wage & Hour Division conducts initial investigations into whistleblower complaints prior to a hearing before the Office of Administrative Law Judges, probably go much of the way toward avoiding the proscription in Section 554(d) against combining investigative and adjudicative functions. Yet even here, it must be noted, Due Process may require that the investigatory file be made available, if at all, to the Office of ALJs and to both parties on equal terms. See F.T.C. v. Atlantic Richfield Co., 567 F.2d 96, 102-03 (D.C. Cir. 1977). But the proposed legislation provides no assurance that this will be so.

Nor does S.2095 provide any assurance that the APA and Due Process proscription against the mingling of adjudicatory with prosecutorial functions will be complied with. Indeed, the fact that the Secretary may intervene at trial on the complainant's behalf, coupled with the command in Section 5(f)(2) that the Secretary look out for the complainant's interests should a complaint be settled, would seem to guarantee that this proscription will be regularly violated. In both respects it is evident that existing Department of Labor procedures are superior to those proposed in S.2095. Under procedures now applicable to all whistleblower cases handled by the Secretary, Department guidelines provide:

> It should be made clear to the parties . . . that WH [the Wage & Hour Division] and SOL [the Secretary] will not represent either party in the hearing. WH and SOL are neutral in such hearings . . . . Such hearing considers only evidence presented at the hearings, and WH findings may or may not be entered into the hearing record.

Wage & Hour Division Field Operations Handbook #52X, "Employee (Whistleblower) Protection Provisions of Environmental Impact Laws," § 52X03(e). S.2095 provides no justification for deviating from this manifestly fair and lawful procedure.

CONCLUSION

We believe that S.2095 is a bad law in many respects. Apart from what we view as numerous constitutional infirmities in the Bill's procedural and remedial provisions, we view these provisions as manifestly unworkable and unfair. And in the specific context of the nuclear industry, we believe that the Bill, if enacted, would bring about results completely at odds with its avowed purposes and with sound national policies. We strongly urge that the assumptions underlying S.2095, and the implications of the specific form it has assumed, be seriously reconsidered.

Nicholas S. Reynolds
Richard K. Walker
Bishop, Cook, Purcell & Reynolds
1400 L Street, N.W.
Washington, D.C. 20005-3502
Telephone: (202) 371-5700

Wisconsin Committee on Occupational Safety & Health
WISCOSH
1334 South 11th / Milwaukee, WI 53204 / (414) 643-0928

SAFETY
BEFORE
PROFITS

President
Ed Marchewka
AFSCME Local 882

Vice Presidents
Milan Racic
AIW International

LuAnn Lonergan
R.N., B.S.N.

Charlene Ossler
Joanna Johnson Professor
Occup. Health Nursing, UWM

Treasurer
Irene Herron-Steeger
AFSCME Local 82

Development Director
Denise Tyson
AIW Local 232

Recording Secretary
Jonathan Rosen
Smith Steel Workers DALU 19806

Membership Secretary
Charity Puhl
IBEW Local 2373

Board Members
Paula Jorgensen
WI Occup. Disease
Resource & Support Comm.

JoAnn King
SEIU Local 150

Rick Koch
UAW Local 438

Pat Levicar
UAW Local 1866

Joe Lewandowski
UAW Local 1866

Julia Means
R.N.

Louis Pezzi
GCIU Local 7C

Diane Richter
UE Local 1111

Ron Watson
AFSCME Local 1055

Executive Director
Mark Schulz

Staff
Joan McManus
Josephine Ebert

August 2, 1988

Labor Subcommittee
608 Hart Senate Office Building
Washington DC 20510

RE: S2095

Enclosed is a copy of our study of OSHA's handling of whistleblowers under Section 11(c) of the OSH Act. I think you'll agree it is strong evidence of the need to revise and improve legislative protection of those workers who do "blow the whistle" on their employers. On behalf of WISCOSH's OSHA Watchdog Project, I ask that the study be entered into the record as testimony in support of S2095.

In this study, we found that out of 249 11(c) complaints filed with the Milwaukee Area Office of OSHA, only 15 -- six percent -- were decided in favor of the complainant. Nearly one-third of the cases were simply screened out by OSHA right at the beginning, without investigation. Discussions with other COSH groups around the country confirm our suspicion that this appalling situation is not at all peculiar to Milwaukee.

The Fidell report to the Administrative Conference is impressive; Senator Metzenbaum's bill is impressive. This letter expresses our OSHA Watchdog Committee's strong support for the bill, S2095.

Sincerely,

Joan M. McManus
Joan M. McManus
Coordinator
OSHA Watchdog Project

Recycled Paper

A CHOICE

14

THE DEADLY DILEMMA

When OSHA Fails to Protect the Worker's Right to a Workplace Free of Health & Safety Hazards

a report from
The OSHA Watchdog Project
of WISCOSH, the Wisconsin Committee on
Occupational Safety and Health
1334 S. 11th St., Milwaukee WI 53204
(414) 643-0928
copies available for $5.00

by
Joan M. McManus

November 15, 1987

TABLE OF CONTENTS

Acknowledgements....................i

Statistical Summary...............ii

Summary............................1

Introduction.......................3

Findings...........................7

Recommendations...................24

ACKNOWLEDGEMENTS

WISCOSH thanks the following people, who gave countless hours of their time, energy, insight and humor to the work of reading and recording data from the hundreds of OSHA 11(c) files that were the basis for this report.

Belinda Collins
Jo Ebert
Jim Hashiguchi
Joe Kohli
Tony Lester
Fran Marlenga
Larry Miller
Chris Muszynski
Penney Payne
Fred Reich
Mark Schulz
Steve Sweet
Denise Tyson
Joe Zanoni

We also appreciate the financial assistance of the Wisconsin Community Fund, whose grant to WISCOSH last year allowed us to organize the OSHA Watchdog Coalition, which initiated this study. Thanks, too, to Larry Miller and Joe Zanoni, who co-chair the coalition; to attorneys Mary Elsner and Judy Kuhn, who prepared the Freedom of Information Act request for us; and to Congressmen Gerry Kleczka and Jim Moody and their staff for helping us get the FOIA fees waived.

Our special thanks go to all the workers whose OSHA case files were studied in preparing this report. They went through the ordeal themselves, while we only studied it and wrote about it. But if this paper helps others deal successfully with OSHA, their experiences will have been worthwhile.

DISPOSITION OF OSHA 11(c)CASES

TOTAL CASES	249 -	100.0%
WON	15	6.0%
LOST	18	7.2
WITHDRAWN OR CLOSED	216	86.7

REASONS CITED BY OSHA, USUALLY MORE THAN ONE:

SCREENED OUT	65	32.7%
NOT ENOUGH PROOF	59	29.6
UNPROTECTED ACTIVITY	26	13.1
TOOK ELSEWHERE	23	11.6
UNTIMELY	20	10.0
PERSONALITY CONFLICT	6	3.0

REPRESENTED BY UNION	39	
REPRESENTED BY LAWYER	9	

OSHA INSPECTION DONE	50	20.1%
CITATIONS ISSUED	105	
PENALTIES ASSESSED	15	CASES
TOTAL CITATIONS ASSESSED	70	
AVERAGE PENALTY	$74	

SUMMARY

Every year, it has been estimated, 117,000 American workers die from work-related health or safety hazards. This report describes the deadly dilemma workers face today: Risk your life by continuing to work in hazardous conditions, or risk your job by trying to get your employer or OSHA to correct the situation.

The federal law creating the Occupational Health & Safety Administration guarantees people the right to a workplace free of "recognized hazards that are causing or likely to cause death or serious physical harm." The law also protects workers from employer retaliation if they complain about working under hazardous conditions. And, it provides a way for them to obtain remedies such as back pay when employer retaliation does occur.

WISCOSH, the Wisconsin Committee on Occupational Safety & Health, filed a Freedom of Information Act request in December 1986, seeking copies of five years' worth of worker complaints of such retaliation filed at the Milwaukee area OSHA office under the provisions of section 11(c) of the OSH Act. By August 12, 1987, 249 of those case files had been delivered to WISCOSH.

We found overwhelming evidence that OSHA not only fails to take worker discrimination complaints seriously, it seems to do everything possible to discourage and deter workers from pursuing such complaints at all. In the handful of cases, 6 percent, where workers won reinstatement and back pay, the key factors were a strong union and an intense personal determination not to give up.

People who won, won largely in spite of OSHA, not because of it.

We also found evidence of questionable conduct by OSHA officials. In particular, we found that at least twice, the OSHA Milwaukee Area Office Director, in violation of the OSH Act, revealed the names of two complainants to their employers as being the ones who had called OSHA to inspect their workplaces for specific health or safety hazards. OSHA investigators seem to have attitude problems, too: Some appear to view their role as that of protector of the status quo, and view workers concerned about on-the-job hazards as nuisances or troublemakers.

WISCOSH's recommendations for improving workers' chances of winning employer discrimination cases do not assume that the mere publication of this report will cause OSHA to reform itself. Rather, we focus on what COSH groups, unions and citizen groups locally and nationally can do to reform OSHA's 11(c) process and strengthen their own efforts to more successfully pursue the rights guaranteed to them by federal law.

INTRODUCTION

> "On the day of the accident...I was working as the hydrocrane operator on the East Chopper. I last saw [deleted] about 4:10 p.m. He was waiting for the maintenance man to finish repairing one of the choppers.
>
> "At about 4:50 p.m., [deleted] asked me where [deleted] was. I said I thought he was in the bathroom. A few seconds later I decided to check where [deleted] was.
>
> "I found him lying between the belts at the west end of the West Chopper. His left arm was wrapped around the drive roller. As soon as I saw him, I ran around to shut off the conveyor, and all the other 'off' buttons. When I got back, I found the drive motor was still working. As [deleted] came around the conveyor, I was trying to cut the belt with a knife that I found nearby. The knife was dull and would not cut. [Deleted] and told him to call an ambulance." Case #83-048, Peter Cooper Corporation

Following that accident, a Cooper employee called OSHA for an inspection which resulted in five citations and a $1,360 fine (later reduced to $136.) During the inspection, another employee revved the motor of his payloader so the OSHA inspector could see the exhaust fumes. Management told him to shut off the motor; he did. The next day he was given a three-day suspension for abuse of company property. A few months earlier, he had called OSHA to inspect after the company had failed to correct inoperative safeties on several cranes; management knew he had called. He believed the suspension was for his health and safety activities, in violation of federal law, so he filed what is known as an OSHA 11(c) complaint. He won reinstatement, and his record was erased -- but his union won it for him, not OSHA.

Section 11(c) of the federal Occupational Safety and Health Act of 1970 was written into the law to provide protection for workers who complain to an employer, their union, their co-workers or the government about health and safety hazards in the workplace.

The law states that employees cannot be fired or discriminated against in any way for asserting their right to "...a place of employment free from recognized hazards that are causing or likely to cause death or serious physical harm."

It then adds further protection: Employees who believe they have been fired or discriminated against because of health and safety activities on the job can file an 11(c) complaint with OSHA. Theoretically, OSHA will then investigate the complaint and, if investigation shows the employee has been discriminated against, the Secretary of Labor "shall bring an action in any appropriate United States district court against such [employer.]" Among the remedies available to employees are reinstatement or rehiring, back pay and purging of personnel records.

It sounds good on paper, but like many things intended to protect the rights of ordinary working people, it doesn't always work the way it should. In fact, the Peter Cooper employee described above was one of only 6% in this study who won their 11(c) cases.

This report describes how workers' rights too often go unprotected by the provisions of Section 11(c), why that is the case, and how workers can best protect their rights when they do ask OSHA for help.

On December 9, 1986, WISCOSH, the non-profit Wisconsin Committee on Occupational Safety and Health, filed a Freedom of Information Act request with OSHA for copies of 11(c) complaints filed with the Milwaukee Area Office since 1983 because, according to the formal request:

> "[W]e have received repeated complaints from our members that OSHA is not investigating or enforcing Section 11(c) of the OSH Act, and that OSHA is discouraging the filing or pursuit of meritorious claims without sufficient investigation. We are trying to determine whether these allegations are true...."

After much delay -- and considerable wrangling over whether our request would benefit the general public, thus allowing a waiver of fees estimated at over $1,000 by Fredric Deeley, an 11(c) Supervisory Investigator for Region V -- Congressmen Jim Moody and Gerald Kleczka intervened in February, 1987. Even with their efforts on our behalf, it took OSHA until the beginning of April to respond to WISCOSH's request to waive fees and release the files.

When OSHA did respond, half of their letter was devoted to explaining why they hadn't originally granted our waiver request. The rest was a clear attempt to convince WISCOSH that pursuing its request for the files would not be worthwhile. Because of limits imposed on OSHA by the Privacy Act and the Freedom of Information Act, Deeley wrote, "...we are concerned that case files would be 'sanitized' to the point that little information of value would remain."

In other words, as this report will make clear, OSHA attempted to do to WISCOSH what it does to its 11(c) complainants: discourage, deter, and delay until no alternative remains, and then -- reluctantly -- deliver. Finally, on May 15, 1987, the first of ten shipments of 11(c) case files were delivered to the WISCOSH office.

On August 12, 1987, the last of the ten arrived: 249 case files in all. They are not all the 11(c) complaints filed with OSHA during the time period in question, simply the ones OSHA sent us.

"Sanitized" they were, as Deeley had predicted; but his other expectation, that little information of value would remain, did not even come close to being the case. In fact, the most difficult part of preparing this report was deciding which "information of value" to cite and which to omit.

Individuals' names were deleted by OSHA under provisions of the federal privacy act. In some cases, complainants had contacted WISCOSH as well as OSHA; we have used some of their names with their permission. [Curiously, out of seven cases in which WISCOSH worked directly with the 11(c) complainant, our FOIA request to OSHA produced a case file on only one.]

7

FINDINGS

Complaints filed under Section 11(c) are resolved by OSHA investigators in a number of ways. Cases can be screened out, dismissed, administratively closed, withdrawn, lost or won -- all for a variety of reasons: filed after the statutory 30-day deadline, taken to another agency, resolved by a union grievance, dismissed for lack of sufficient proof, dismissed for lack of any protected activity, or screened out almost immediately -- for any of those reasons, but usually for insufficient proof or unprotected activity.

The latter two are the reasons WISCOSH encountered most often in its analysis of the OSHA case files, accounting for nearly half of the 216 complaints that were not definitively won or lost. And it is these two reasons which account for the high level of frustration expressed by those workers whose case files we analyze here.

Reading the files makes it abundantly clear that workers who call for OSHA health or safety inspections at their workplaces and then file 11(c) complaints with OSHA may well be putting their jobs on the line by doing so.

But it is also clear that they go to OSHA in good faith, expecting that something will be done to correct the hazardous conditions they complained of, and that something will be done to protect their right to make such complaints without employer retaliation.

Reality -- as demonstrated in the files WISCOSH examined -- falls far short of those fully justified expectations. The files reviewed by WISCOSH reveal the following problems with OSHA's handling of 11(c) complaints.

PUSHING TO DROP CASES AS SOON AS POSSIBLE

Most workers' complaints will be screened out by OSHA on the day they are filed or soon afterward. Many are eliminated for legitimate reasons; but far too many, such as the case described below, are screened out under questionable circumstances.

Employed for 15 years as a maintenance person at Schellgell Food Service in Milwaukee, the complainant serviced food vending machines at factories. On December 8, 1983, he was servicing machines near the welding area at Dickten & Masch, and commented to workers there that the noise from the welding machine was so loud it hurt his ears. The workers replied that they had suffered hearing loss as a result of the noise.

When he went to service the coffee machine in the plant manager's office, he commented on the noise to the manager, who replied that he was aware of it and had ordered a new machine. The complainant saw a pair of ear plugs on the manager's desk, but did not comment on them.

Instead, he went back to the welding area and told the workers that the manager said a new machine was on order; but the workers said they'd been told that for months and didn't believe it. He asked why they didn't have ear plugs and was told that they had requested them several times but had never gotten them.

He returned to the plant manager's office to finish working on the machine there. He told the manager that the ear plugs on his desk were very effective ones and that he serviced machines in a place that had plenty of them. He offered to get some for the manager.

The manager became angry and told the complainant that he had no business talking to his employees and asked him who he thought he was to be disrupting his work force. The complainant did not reply, but simply left the office.

Later that day he was informed by his employer that he was to attend a service meeting that afternoon. He told his employer he would not be able to attend because of an appointment at his bank. The next day he was fired. His employer said he was fired because he failed to attend the service meeting and because he had been late for work once nine months earlier.

It was not until January 17, when he attended his unemployment compensation hearing, that he learned the real reason for his firing: Dicksen & Masch had told his employer that if he was not fired, they would withdraw their business from Schellgell.

He called OSHA a week later and "was advised by this investigator that one must file within 30 days of the adverse action, however, his circumstances, subject to review of the [supervisory investigator,] may toll [extend] the filing period."

Six days later, Jim L. Sumpter, an OSHA supervisory investigator, wrote the complainant to tell him that "...your allegation would not constitute a violation of Section 11(c)(1) of the OSHA Act....this file has been administratively closed." Case #84-026, Schellgell Food Service

PRESSURING PEOPLE INTO WITHDRAWING COMPLAINTS

In general, workers who complain to OSHA will continue to be pressured by investigators to withdraw their complaints or let them be closed administratively by OSHA, because success at OSHA means a closed case. In this study, 86.7% of the 249 cases were withdrawn or closed by OSHA. In many of these cases, the amount of time and energy people put into working on their complaints makes it clear that they withdrew only out of total frustration with OSHA.

[Deleted] used the Right to Know law to find out whether the chemicals he worked with at Rose Plastics were causing his breathing difficulties. When he found that they did present health hazards, he and several co-workers also exposed to the chemicals asked OSHA in late March of 1986 to conduct an inspection of the plant. [Deleted] was fired one week later. He describes his experience this way:

> "After I was fired [on April 7, 1986] I filed an OSHA 11(c) discrimination complaint. When I went to file the complaint the first thing I was told was that I probably didn't have enough evidence and I should forget about filing. I told him it was his job to take the complaint and not his job to discourage me from filing a complaint.
>
> "The 11(c) investigator met with me at my home. He took most of the evidence I had. He also stated I probably didn't have enough evidence. He said that it is a long process to prove why I was fired. He was trying to discourage me from filing the complaint.
>
> "On August 6th I received a letter from him stating that they felt there was no merit to the case and telling me how to appeal the decision, which I did appeal.
>
> "I feel the investigation was not adequate. I feel one key witness was not interviewed, and that this witness would back my story without a doubt." Case #86-020, Rose Plastics.

REVEALING NAMES OF WHISTLEBLOWERS TO THEIR EMPLOYERS

In the cases we observed in which names were revealed, those responsible were supervisory personnel who surely knew that names of people filing complaints with OSHA are never supposed to be disclosed to employers or anyone else without their permission.

> "After the inspection, I went to an informal meeting at the OSHA office. [Deleted] of company management were there. When the OSHA people were ready for us, the one man [Gerald Cunningham, OSHA Area Director] came out where we were waiting and introduced himself. The management people introduced themselves, but before I had a chance, the OSHA man said 'Are you Smith?' I said no, I'm Jones*. The others looked at me with surprised looks on their faces."
>
> * [Not their real names]
>
> Jones was the president of a union local at the Vilter plant. Smith was a former president of another local of the same union who now worked at Vilter. And now management knew that it was he who had requested the OSHA inspection, one which resulted in 12 citations and fines of $780, [later reduced by Cunningham to $60.]
>
> OSHA's own Telephone/Activity Record has this to say: "4/10/4 10:30 A --Jerry Cunningham not aware. States he or Phil would have met people. Based upon numerous contacts with Smith, he believes he may have assumed Jones was Smith but does not recall addressing him as Smith....4/13/4 11 A --Jerry repeats it's possible he did, but can't remember."

Why did it matter if the company knew Smith had called for the OSHA inspection? Smith and several other crane operators had been laid off shortly after the inspection took place; he was still laid off in January when he learned from the union that the company had hired a temporary crane operator instead of calling him back from lay-off. Jones told Smith about Cunningham having used his name in the closing conference, adding that he believed this was why the company had not called him back to work.

Smith filed an 11(c) complaint against Vilter based on that information. Six months later he withdrew his complaint because OSHA investigator Randall Koonce told him that the company did not recall him "for economic reasons." If he had been recalled, the company's lawyers said, in three weeks he would have been out of his probationary period and in the union, thus costing the company $945.36 in medical benefits and floating holidays for three months. OSHA agreed that this was the real reason for not calling him back to work. Case #84-023, Vilter Manufacturing Corporation

Tony Lester, who has worked at the Ladish Company for over 20 years, had a similar experience. He called OSHA for an inspection and was told later by representatives of his union, IAM Lodge #1862, that in their presence, during the closing conference after the inspection, Ladish officials told OSHA's Cunningham that they had "...a pretty good idea who the complainant was....Mr. Cunningham asked them to guess. They guessed it was I and Mr. Cunningham confirmed."

Lester filed an 11(c) complaint against Ladish for harassment due to his past involvement concerning health and safety problems at the plant. He also filed a complaint with OSHA against Cunningham. Both were filed January 20, 1984 with Frank Strasheim, OSHA's regional administrator. By early June, Lester's exasperation with the way OSHA was handling his case was obvious in a letter he wrote to Strasheim:

> "Re: your phone call to me on 6/5/84.
> I would like to respond to the issues that you have brought to my attention and some issues I brought to your attention during our phone discussion:

> "1. Your statement that I have lost my credibility with you for sending a letter to Representative Gerald Kleczka. Because of my problems with the Milwaukee OSHA office and your regional office, I still feel that this letter is an accurate account of my problems with OSHA.
>
> "2. Your statement asking me if I'm on a witch-hunt. If trying to make the Ladish Co., my place of employment, a safer place for my brothers and sisters and asking for help for these problems is called witch-hunting, then I will agree with you that this is a witch-hunt.
>
> "3. ....I discussed my case with Mr. Smith on 5/23/84 in which he told me that he is investigating my 11(c) complaint. I asked him about my allegation concerning the Milwaukee Area Director's acknowledgement of the release of my name to the company, and he stated that he was not handling this part. Your 5/17/84 letter states that both cases are the same. I still would like to know who is going to investigate my allegation that the Milwaukee Area Director had acknowledged that I was the complainant.... "I would also like you to know, before you again ask me, that I wrote this letter myself without asking for ideas or input from other safety minded individuals. I hope this will put you at ease somewhat so that if you do call me you will not be so upset as you were in our last phone discussion."
>
> A month later, Lester was informed by Investigator Smith that his complaint against Ladish would be dismissed and that Strasheim would handle his complaint against Cunningham. He filed an appeal notice in August on the Ladish dismissal; that appeal was denied in October. Strasheim told Lester he would "talk to" Cunningham about the matter of revealing Lester's name to his employer. Case #84-022, Ladish Company

ACTING AS AN ADVERSARY, NOT AN ADVOCATE

Most cases seem to be OSHA v. Worker, putting those who refuse to withdraw their complaints through an endless stream of catch-22 situations:

Individual workers who file an 11(c) complaint, but do not file a formal complaint with OSHA related to health and safety hazards on the job, are often told that they have not engaged in "protected activity," even if they did complain to their employer. On the other hand, in cases where workers did file a complaint with OSHA, and their employer did something to retaliate after OSHA inspected the worksite, resulting in an 11(c) complaint, the employer will be notified by OSHA that a complaint has been filed -- giving the employer time to dream up the "real" reason why he disciplined or fired the worker involved.

OSHA then puts the burden on workers to prove that they were really disciplined or fired as retaliation. The agency's excuse for not tracking down witnesses and taking sworn statements from them will be that it is the worker's job to do so and OSHA can't do that job for them.

Confronted with that situation in his 11(c) complaint, Terry Berg wrote this to the investigator assigned to his case:

> "I do not feel it is my duty or ethically, my place, to prompt witnesses or ask them to write affidavits swearing to their knowledge of MCTS actions against me due to my safety activities, although they will, if necessary, if you fail to investigate fully. I feel the investigation per se is yours to design and I feel uncomfortable and inexperienced when you ask me to tell you what to do -- especially since you will not even consider my responses. I believe the legal onus is not meant to fall on the layperson complainant, but on their plaintiff in litigation."

Berg says he still has not been notified by OSHA about the final determination of his complaint. He no longer works for the transit system. Case #86-029, Milwaukee County Transit System

Winning a health and safety discrimination case through OSHA is not easy. Only nine of 15 complainants who won their cases won with OSHA's help. A reading of OSHA 11(c) investigators' final case reports provides one explanation for such a low success rate.

Despite the fact that neither the OSH Act, nor its official regulations, nor the OSHA Field Operations Manual calls for the use of any criteria beyond the need to prove that so-called protected activity took place, in actual practice, OSHA's 11(c) investigators use four criteria in making the decision to close or continue an investigation.

>>PROTECTED ACTIVITY. Workers must be able to prove that they engaged in health or safety activity related to the workplace. And, as noted above, usually the investigator will insist that the protected activity involved calling OSHA for an inspection. In one case, someone other than the complainant had called OSHA, but management thought he, the complainant, had called. They fired him. OSHA screened out his case due to lack of protected activity.

>>EMPLOYER KNOWLEDGE. Next, workers must prove that their employer knew they had engaged in protected activity, something which is difficult to do. An employee of Olsen Auto Supply in Racine injured his knee in a workplace accident and filed for and received Workers Compensation benefits. While recuperating, he called OSHA to inspect the construction site where he'd been injured. They did an inspection in June 1984.

When he returned to work on July 11, he saw his boss, who said to him, "Anybody who calls OSHA need not work for me." The man then told his boss that he had called OSHA, and at that point, according to his sworn statement to OSHA, his boss "...jumped out of his chair and swung at me and called me a 'low life.'" There were no witnesses.

The OSHA Investigator in the case wrote in his Memo to File on the closing conference with the company: "Intent is lacking from the evidence available, because the Respondant [Olsen Auto Supply] denies knowing or mentioning OSHA in any way."

His Memo to File on the closing conference with the complainant reads like this: "By appointment with Complainant, met with him at gas station and restaurant for a Closing Conference. Revealed the results of the Respondant's conference to Complainant, who said he didn't think the Respondant would admit mentioning OSHA." He withdrew his complaint. Case #84-067, Olsen Auto Supply.

>>INTENTIONAL DISCIPLINE. After workers prove they have engaged in protected activity related to the workplace, and after proving that the employer at the workplace knew they had taken the protected action either alone or with others, they must now prove that after the employer knew, he treated the complaining workers differently than he had before -- e.g., not getting overtime any more, being written up for something done many times before without receiving disciplinary action, being laid off and not recalled, being fired.

Another way of proving this is to demonstrate that after the employer knew, he began treating the worker who complained in a different way from how he treats other workers when they do essentially the same things. Whichever it is, workers must show the employer took some step to discipline them and that it was because he knew they had engaged in protected activity.

>>DELIBERATE RETALIATION. OSHA calls this "animus," a Latin

word for hostility. It is a vague criteria as OSHA uses it, because it seems to take the criterion of Intentional Discipline one step further and insist that not only did the employer punish workers knowing they had "protected status," but also that the employer did it on purpose, solely as punishment for health and safety activity.

One good example of how hard OSHA makes it for workers is Case #86-024, Tuf-Seal, a division of the Kelley Company. The complainant had worked as a building inspector and fire inspector and so was acknowledged by OSHA to be more aware than the average person about health or safety hazards. He was active on the company's safety committee and at one meeting he told management that if the weld screen was not repaired within two weeks he would call OSHA on it.

Two weeks later he was fired "for the good of the company." Ten days later, OSHA inspected, found 23 violations and fined the company $350. But the fired man stayed fired. His former employer told the OSHA investigator that he was fired for a "personality conflict not related to safety issues."

The investigator not only took the company's word for it, he also kept telling the complainant that the burden of proof was on his (the worker's) shoulders and OSHA could not do the job for him. He finally withdrew his complaint saying, sarcastically, that he must just have had a personality conflict with his former boss.

In summary, then, workers are far better off if they belong to a strong union with a commitment to health and safety issues, because then, by filing a grievance according to their contract or an unfair labor practice complaint with the National Labor Relations

Board, they can avoid having to rely only on OSHA for protection.

In the cases reviewed by WISCOSH, of the 15 won by the complainant, five were represented by a union and all of those were won not with assistance from OSHA, but solely through a union grievance. One case was won by the complainant alone; it was the only case in the files examined that actually went to court. But it took three years for the case to be concluded, and by the time the complainant had won, OSHA could not locate him to inform him that because the company he'd filed the complaint against had gone bankrupt and its former owner could not be found, he would not be able to collect the back wages he'd won. OSHA closed out the case. Case #81-037, Budget Transmissions.

DOING VERY LITTLE TO CORRECT WORKPLACE HAZARDS

In most of the case files examined, what set the process in motion was the filing of an "OSHA 7" form, detailing specific health and/or safety hazards in the employee's workplace. For the most part, these tend to be fairly serious hazards; the people who fill out an OSHA 7 are doing it because they want OSHA to conduct an inspection and issue citations to their employer which will result in elimination of the hazardous conditions.

What are hazardous conditions?

* At Aluminum Casting and Engineering Company, the roof leaked around the furnaces in the heat treat area, causing slippery floors near the hot water quench tank, which had no cover or guard rail. Workers were exposed to the risk of falling 15 feet into a tank

filled with 140 to 170 degree water. One worker almost did, breaking an ankle in the process. Case #83-033.

* At Fall River Plastics, polyoxymethylene-copolymer was causing upper respiratory tract and eye irritations in workers. The entire plant had been evacuated for about 40 minutes because of fumes from thermal decomposition of the chemical, which results in the release of formaldehyde, a known cancer-causing agent. Case #86-028.

* At Weiland Manufacturing, a worker refused to do any more work inside a tank 11 feet in diameter and 14 feet long, with a 20-inch in diameter hole at the top. He had been wiping down the inside of the tank with xylene, a solvent which can cause dizziness, passing out and death. Repeated exposure may damage bone marrow, the liver, kidneys and the surface of the eye. The company provided the worker with no outside safety person, no lifeline and a paper air mask instead of a proper respirator. The OSHA inspection found no violations for this because the operation wasn't being run the day OSHA inspected. They did not set another date to inspect when the operation would be running. Case #86-010.

* At Universal Foods' Amber Labs facility in Juneau, according to another case file,

> "I was cleaning out a sludge digester that was leased from the city of Juneau on the old wastewater treatment site....[It was taking too long to pump it out, so management decided to have an employee go down and scoop it out in five gallon pails.] He told me it was a dirty job and that someone had to do it and that was me and if I didn't like it I could punch out, that I was done work [fired.] And I told him it was not safe and he insisted that he would not send a man down there if it wasn't safe.

> "I kept on insisting that it wasn't safe, that it was giving off a dangerous gas. He gave me the same answer that he gave me before and he was done talking to me. Then I told him that it looked like I had no other choice, either take my chance in the hole or get fired!
>
> "That's when I came in contact with raw sewage -- human waste. That's when the trouble started. While I was down there, I started to get dizzy and did not have the ability to get out any more [without a safety harness.] I do not recall from then on. This is an account of what my men said happened to me. One said I looked kind of dazed and like I was having coordination problems, so they dropped a plank down in the tank for me to stand on. They said I was still having problems and they were concerned. [Deleted] came down in the tank to see what was happening. I was falling backwards against the plank with my back and even two or three times fell in head-first into the sewage.
>
> "[Deleted], a co-worker, told [deleted], 'My God, do we have to stand here and watch this shit, this is insane, do something!' Then I started crawling up the walls of the tank trying to get out. I was saying 'I have to get out of here' and kept on repeating that. [It took five or six men to pull me out, lay me on the roof and clean the stuff from my face and mouth. A supervisor went up to the plant to discuss what they should do about me.]"
>
> After nearly two hours, the worker finally convinced management to take him to a doctor. The doctor "took one look at me and said, 'Into the hospital immediately.'" He was unable to work for a year as a result of toxic chemical poisoning and oxygen deprivation suffered during the 15-20 minutes he spent in the tank.
>
> He said the tank was about 36'high by 36'wide with a 45-degree cone-shaped base. It had one man-hole 4' by 4', and a wood top with about six square feet of open area.
>
> A few months after he returned to work, he complained to management and then to OSHA of exposure to asbestos because of improper asbestos removal methods. OSHA did inspect and issued citations. He was then given two disciplinary notices and filed an 11(c) complaint and a grievance. He won the grievance and the notices were removed from his file. Case #84-056.

In all, OSHA inspected workplaces in only 50 of the 249 cases reviewed in this study to verify the presence of hazardous conditions which violate federal standards. Still worse, in the 50 inspections, only 103 citations were made. Citations accompanied by penalties totalled 70, from 15 workplaces. The total dollars in penalties assessed was $5,231, which comes to an average penalty of $74. And, since OSHA admits they don't keep track of whether or not these penalties are ever paid, we can't say whether these were.

HAVING AN ATTITUDE PROBLEM

In filing complaints involving hazardous work conditions, employees know they are putting their jobs on the line, but they are faced with an impossible choice: complain and run the risk of losing their job, or not complain and run the risk of being injured or killed because of that job.

So when OSHA treats workers who complain as if they are the wrong-doers, it leads to extreme frustration and anger. The attitude of OSHA toward workers is bluntly described by former OSHA 11(c) investigator Richard Murray, in his February 1986 testimony before the Illinois 2nd Congressional District's Citizens Panel on Employee Rights:

"On my first day in 11(c), my supervisor...took me aside and seriously oriented me to the 'real world out there in the streets: 85% of the complainants who come in here are the scum of the earth.' He was dead serious -- and I soon discovered that the office operated on just that premise."

This attitude gets transmitted into the case files when OSHA's 11(c) investigators summarize statements made by the complainant and the company, as these excerpts from a Prange Way Discount Stores file show:

> First reference: "...he accidently caused a bulletin board to fall from its mounting. (It had fallen recently before that.)" OSHA intake worker.
>
> Second reference: "...pulled at bulletin board -- angry gesture -- did not realize board was loose -- it fell." First OSHA investigator.
>
> Third reference: "...pried the frame and cover from the employee bulletin board and threw it to the floor. It landed approximately four inches from my feet." Security guard, witness for company.
>
> Fourth reference: "He admitted to damaging the bulletin board, although he said it was an accident. He said he was sorry and wanted to pay for the bulletin board. I told him it was too late to be sorry...." Personnel Manager.
>
> Fifth reference: "...he then told [deleted] 'Wanna know what I think of this place? This is what I think of this damned place,' and then ripped the employee bulletin board off the wall and threw it to the ground several inches from [deleted] feet. A copy of [deleted] statement is enclosed. He subsequently threw several trash containers to the ground and tried to flatten them by standing on them." Letter from company to OSHA.
>
> Sixth reference: "When C walked out of the office, he could not control his temper and he grabbed the Employee Bulletin Board from the wall and threw it to the ground saying something to the effect that 'This is what I think of this place.'" Second OSHA investigator's memo to file.
>
> Seventh reference, in the OSHA Final Investigative Report: "Outside of the Personnel office, he grabbed the bulletin board from the wall and threw it to the floor stating that 'This is what I think of this place.' He then proceeded to throw or kick the trash cans."
>
> The case was dismissed by OSHA. Case #84-037.

Richard Murray, the former OSHA 11(c) investigator, says that most of OSHA's investigators are retired military and civilian police officers. That goes a long way toward explaining why they treat 11(c) cases and complainants as they do -- many people in those jobs believe that their role is to preserve and protect the status quo. Workers who insist on their right to a hazard-free workplace are -- to OSHA -- at best, time-consuming nuisances, and at worst, rabble-rousing troublemakers with a personal vendetta against OSHA.

With attitudes and practices such as those detailed above, it is not surprising that so few 11(c) complaints are resolved in favor of the worker. But despite the odds, WISCOSH believes that there are ways workers can improve their chances of winning their law-given right to a job in a place that is not a hazard to their lives.

RECOMMENDATIONS

Our recommendations focus on work that can be done by unions, individual workers, citizens groups and health and safety agencies such as WISCOSH and the other COSH groups around the country. We suspect that what we found in Milwaukee is similar to what would be found in any other part of the country, and we have made these recommendations with that in mind.

1. UNIONS. It rapidly became clear in our analysis of the case files that having a strong union with a serious commitment to the health and safety of its members is absolutely essential in dealing with OSHA -- and in using the grievance procedure to avoid having to deal with OSHA at all.

Therefore, we recommend that unions put a very high priority on building strong and knowledgeable Health & Safety Committees, using WISCOSH and this report as resources.

We also recommend that unions ask their attorneys to become familiar with the 11(c) process so that they can be of more assistance when a member is caught up in OSHA's web.

2. WORKERS NOT IN UNIONS. It also rapidly became clear that workers in non-union shops are terribly vulnerable. Their workplaces tend to be more dangerous in the first place, and when they complain they are much more likely to face employer retaliation than are union workers. OSHA knows they are fighting on their own, and sees them as fast screen-outs because of it.

We urge concerned workers in those plants to use health and safety hazards in the plant as an organizing tool to get a union started. WISCOSH is prepared to help in any way possible, including getting you in touch with unions organizing in your area.

Workers should write up a complete description of what the health or safety hazard was, what they did about it, and exactly what the employer did to retaliate against them. It is important to write it up as soon after it happens as possible. If there were any witnesses, get them to write up what they heard and saw take place. WISCOSH can help here, too.

Once you begin dealing with OSHA, give serious consideration to letting your Congressperson know about your case. Frequently they can bring pressure to bear on OSHA, making them take your case more seriously.

Finally, if it is a serious complaint with a substantial amount of back pay as a possible settlement, consider hiring a lawyer. WISCOSH can provide names of lawyers who are pro-worker, who know labor law and who will sometimes take cases at no charge.

3. OUTSIDE SUPPORT. The need for educating unions and workers on how to file and fight for an 11(c) complaint at OSHA is tremendous. We need to do as much as possible to publicize this report as a way of increasing the general public's awareness of workplace health and safety hazards and of OSHA's unwillingness to take workers' complaints of those hazards seriously.

An advocacy project or a panel of volunteer lawyers must be organized to be available to workers regularly, helping guide them through the OSHA process. No one should have to do an 11(c) complaint alone, without access to guidance from people who know the process and are on the worker's side.

A support network for people involved in 11(c) complaints also needs to be organized. This should be made up largely of people who've already been through the process and understand the incredible frustration it causes. Such a network could also function as a resource for organizing at non-union shops where, as stated above, major workplace hazards exist and retaliation is prevalent.

4. CONGRESSIONAL ACTION. Unions, individuals and political action organizations need to push Congress to change the OSH Act:

a. Currently, a complaint needs to be filed within 30 days of the act of discrimination. That time should be extended to the 90 days required by the NLRB in similar cases.

b. Currently, OSHA is not obligated to inspect plants involved in 11(c) complaints. We believe the statute should be amended to mandate automatic inspections in such cases.

c. Currently, the remedies available to workers in 11(c) cases are back pay, reinstatement, rehiring and purging of personnel records. We recommend that punitive damages be available as a remedy and that private legal action against the employer by the employee or the union also be permitted.

d. Currently, OSHA acts as if the worker who asks for an inspection or files an 11(c) complaint is guilty until proven an innocent victim. We recommend strongly that instead, there be a strong presumption that discrimination did occur and the burden of proof is on the employer to show that it did not.

e. Currently, OSHA frequently insists that a formal health or safety complaint must have been filed with them before a worker can fit under their "protected activity" designation. We recommend that the definition be broadened to include other, less formal, health and safety activity. The fact that a worker notices a hazard and expresses concern about it should be adequate.

WISCOSH

The Wisconsin Committee on Occupational Safety and Health is a non-profit organization made up of workers, unions, attorneys, medical and health and safety professionals concerned with improving occupational safety and health. Since 1979, WISCOSH has conducted health and safety educational programming for workers throughout Wisconsin. WISCOSH programs, publications and technical assistance are designed to aid workers in hazard identification and to outline effective strategies for workplace change.

Senator **Metzenbaum**. With that, the hearing stands adjourned.

[Whereupon, at 9:50 a.m., the Subcommittee was adjourned.]

○